

***United States Court of Appeals
for the
District of Columbia Circuit***



**TRANSCRIPT OF
RECORD**

CHAMBERS OF JUDGE BAZELON
UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

October Term 1956

No. 13,621

No. 509-55

United States Court of Appeals
For the
District of Columbia Circuit

FILED DEC 26 1956

WILLIAM C. GREENE.....

vs.

THE UNITED STATES OF AMERICA.....

APPELLANT,
CLERK
APPELLEE.

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

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JOINT APPENDIX

121-4501

UNITED STATES)
v.) Criminal No. 509-55
WILLIAM C. GREENE)

(1)

Washington, D. C.,

Wednesday, February 1, 1956

This case came on for trial before Judge ALEXANDER HOLTZOFF and a jury at 10:12 a.m. today.

BARBARA ELLEN FLOYD,

(19)

called as a witness by counsel for the United States and being first duly sworn, was examined and testified as follows:

DIRECT EXAMINATION

BY MR. MC LAUGHLIN:

Q Your full name is what?

A Barbara Ellen Floyd.

Q Miss Floyd, prior to January the 14th of 1955, did you know the defendant here, William Greene?

A Yes, I did.

Q And how long prior to January the 14th of 1955 did you know Mr. Greene, the defendant here?

A I think I knew him around the first part of the summer of 1954. (20)

Q Do you recall on December the 11th of 1954 of seeing a man who later was identified to you as Mr. Kelly, a narcotic agent?

A I remember meeting Mr. Kelly.

Q And where did you meet Mr. Kelly?

A At the Old Ebbitt Grill.

Q And the Old Ebbitt Grill was located where at that time?

A Between 14th and 15th on F Street, Northwest.

Q And at the time that you met Mr. Kelly, do you recall what name you met him by, what name was used?

A No, I don't remember.

Q And at the time you met Mr. Kelly, who was with you?

A William Greene.

Q And is that the defendant here?

A That is right.

Q And when you say you met Mr. Kelly, who introduced you to Mr. Kelly?

A William Greene.

Q During the time that you met Mr. Kelly, up until January the 14th of 1955, were you personally using narcotics?

A Yes, I was.

Q Recalling your attention to January the 14th of 1955, do you recall meeting a man you later learned his name was Fialkewicz? (21)

A That is right.

Q And Mr. Fialkewicz you know now is a Federal Bureau of Narcotics agent? Is that right?

A That is right.

Q And where did you meet him on January 14th of 1955? Can you recall?

MR. LEVIN. I object to that. I don't think she said she met him then.

THE COURT. I didn't understand you, Mr. Levin. Speak up. (21)

MR. LEVIN. Mr. McLaughlin mentioned a date. I do not believe the witness mentioned any date at all.

THE COURT. Don't argue. State your objection in legal terminology.

MR. LEVIN. I am objecting to his leading of the witness.

THE COURT. Objection overruled.

BY MR. MC LAUGHLIN:

Q I will ask you, on or about January 14 of 1955 did you see Agent Fialkewicz?

A Yes.

Q And where did you see him at that time? Do you recall what part of the city?

A Before that date?

Q No; on that date of January 14, 1955. (22)

A I can't connect my meeting him with the exact date, because I am not positive of the dates.

Q Well, do you remember meeting him on or about that date of January the 14th?

A It was in January.

Q And where did you meet him the first time?

A I believe Fialkewicz and another --

Q Talk a little louder. You see, you are dropping your voice.

A I believe Agent Fialkewicz and another friend of his picked me up at work.

Q And was that in the District of Columbia?

A That is right.

THE COURT. Picked you up at work, you say? Where was that?

THE WITNESS. The Senate Building.

BY MR. MC LAUGHLIN:

Q And at that time did you have any transaction with Fialkewicz?

A I am not positive of that time; but I think that night we drove down to the Old Ebbitt Grill.

Q And when you drove down to the Old Ebbitt Grill, how long did you stay at the Old Ebbitt Grill?

A Maybe an hour or so. I am ~~not~~ positive of the time.

Q Did you leave the Ebbitt Grill? (23)

A Yes.

Q And when you left the Ebbitt Grill, where did you go?

A I don't recall.

Q Did Agent Fialkewicz on that night give you any money?

A Yes, I believe he did.

Q And do you recall how much money he gave you?

A I am not too positive. It was thirty dollars, maybe more.

Q And what did he give you the \$30 for?

A To purchase narcotics?

Q Any particular type of narcotics?

A Heroin.

Q After you received the \$30 from Agent Fialkewicz, where did you go after you left the Ebbitt Grill?

THE COURT. Speak a little louder.

(25)

THE WITNESS. Fialkewicz and two other of his friends picked me up (26) after work and drove me home. And then we went down to Duke Ziebert's for dinner. And after that, on the way driving me home, he purchased several capsules of heroin from me for eight dollars.

THE COURT. And do you recall how many capsules of heroin he purchased from you for the eight dollars?

THE WITNESS. Four.

BY MR. MC LAUGHLIN:

Q And where did those four capsules come from?

A From William Greene, that I had had.

Q Recalling your attention to on or about January the 21st of 1955, do you recall seeing Agent Fialkewicz on or about that time?

A I saw him in January, but I am not positive of the dates.

Q Will it refresh your recollection, on or about that time, do you remember receiving a hundred dollars from Fialkewicz?

A That was one morning he called me.

Q Who called you?

A Fialkewicz. And I told him to pick me up and give me the money and drop me off at work. So he picked me up. I think I met him in Brentwood Village and he drove me a block away from Bill Greene's house.

Q And when you say "Bill Greene," you mean the defendant here?

A That is right. And I took the money into Bill's house and gave it to him.

(27)

Q That is, to the defendant Greene?

A That is right. And he told me to call him back at his home around 11 or 11:30.

Q Who told you that?

A William Greene. And then I returned to the car and the agents drove me to work and I told them to call me later on at work.

THE COURT. I am afraid I didn't get all of that answer. Mr. Reporter, will you read that answer.

Try to keep your voice up.

(The last answer was read by the reporter.)

THE WITNESS (continuing). Well, they called several times at work. And I talked to Bill in the meantime.

THE COURT. I didn't understand you, Mr. Levin. Speak up. (21)

MR. LEVIN. Mr. McLaughlin mentioned a date. I do not believe the witness mentioned any date at all.

THE COURT. Don't argue. State your objection in legal terminology.

MR. LEVIN. I am objecting to his leading of the witness.

THE COURT. Objection overruled.

BY MR. MC LAUGHLIN:

Q I will ask you, on or about January 14 of 1955 did you see Agent Fialkewicz?

A Yes.

Q And where did you see him at that time? Do you recall what part of the city?

A Before that date?

Q No; on that date of January 14, 1955. (22)

A I can't connect my meeting him with the exact date, because I am not positive of the dates.

Q Well, do you remember meeting him on or about that date of January the 14th?

A It was in January.

Q And where did you meet him the first time?

A I believe Fialkewicz and another --

Q Talk a little louder. You see, you are dropping your voice.

A I believe Agent Fialkewicz and another friend of his picked me up at work.

Q And was that in the District of Columbia?

A That is right.

THE COURT. Picked you up at work, you say? Where was that?

THE WITNESS. The Senate Building.

BY MR. MC LAUGHLIN:

Q And at that time did you have any transaction with Fialkewicz?

A I am not positive of that time; but I think that night we drove down to the Old Ebbitt Grill.

Q And when you drove down to the Old Ebbitt Grill, how long did you stay at the Old Ebbitt Grill?

A Maybe an hour or so. I am ~~not~~ positive of the time.

Q Did you leave the Ebbitt Grill? (23)

A Yes.

Q And when you left the Ebbitt Grill, where did you go?

A I don't recall.

Q Did Agent Fialkewicz on that night give you any money?

A Yes, I believe he did.

Q And do you recall how much money he gave you?

A I am not too positive. It was thirty dollars, maybe more.

Q And what did he give you the \$30 for?

A To purchase narcotics?

Q Any particular type of narcotics?

A Heroin.

Q After you received the \$30 from Agent Fialkewicz, where did you go after you left the Ebbitt Grill?

A I went over to Bill Greene's house. (23)

Q When you say "Bill Greene," you mean the defendant here, Bill Greene?

A That is right.

Q And at that time Bill Greene lived where?

A Fourteenth and Michigan Avenue, Northeast.

Q And when you went to Bill Greene's house on that occasion, who did you see in that house? (24)

A William Greene.

Q That is the defendant here?

A That is right.

Q And what happened when you saw William Greene in that house on that occasion?

A I exchanged the money for heroin, to give it to Fialkewicz.

Q And you exchanged the money with whom?

A William Greene.

Q And do you recall how much narcotics you received?

A I can't remember the exact amount, because I don't remember the amount of the money.

Q Give us your best recollection as to the number of capsules you received at that time.

A Well, I know it was at least 15 or more capsules, if I received \$30. But I am not positive of the amount of money the agent gave me at that time.

Q And when you received those caps from the defendant Greene, where did you go with them?

A I gave them to Agent Fialkewicz; but I don't remember where I gave them to him.

Q Was it in the District of Columbia?

A That is right.

Q Recalling your attention again to January 18 of 1955, do you recall seeing Agent Fialkewicz on that date? (25)

A I can't be positive of the dates; but I know I saw him on quite a few occasions in January.

Q Well, try to refresh your recollection, on that particular date, if you saw Agent Fialkewicz.

A I remember on one occasion it was in the morning he picked me up to drive me to work. And he had some money.

Q How much money did he have?

A Between eighty and a hundred dollars. I am not positive.

Q Prior to receiving that moneys, prior to that occasion and after the occasion at the Ebbitt Hotel, did you have any dealing with Fialkewicz?

A Not that I can recall. I can remember meeting him on several occasions, but I don't remember which came first or after.

Q Do you remember any time, that is, after January 14, of receiving eight dollars from Fialkewicz?

A Yes.

Q Tell us about that.

A He picked me up after work.

Q Talk real loud, please.

A Fialkewicz, and I believe it was Tremoglie ---

THE COURT. Speak a little louder.

(25)

THE WITNESS. Fialkewicz and two other of his friends picked me up (26) after work and drove me home. And then we went down to Duke Ziebert's for dinner. And after that, on the way driving me home, he purchased several capsules of heroin from me for eight dollars.

THE COURT. And do you recall how many capsules of heroin he purchased from you for the eight dollars?

THE WITNESS. Four.

BY MR. MC LAUGHLIN:

Q And where did those four capsules come from?

A From William Greene, that I had had.

Q Recalling your attention to on or about January the 21st of 1955, do you recall seeing Agent Fialkewicz on or about that time?

A I saw him in January, but I am not positive of the dates.

Q Will it refresh your recollection, on or about that time, do you remember receiving a hundred dollars from Fialkewicz?

A That was one morning he called me.

Q Who called you?

A Fialkewicz. And I told him to pick me up and give me the money and drop me off at work. So he picked me up. I think I met him in Brentwood Village and he drove me a block away from Bill Greene's house.

Q And when you say "Bill Greene," you mean the defendant here?

A That is right. And I took the money into Bill's house and gave it to him.

(27)

Q That is, to the defendant Greene?

A That is right. And he told me to call him back at his home around 11 or 11:30.

Q Who told you that?

A William Greene. And then I returned to the car and the agents drove me to work and I told them to call me later on at work.

THE COURT. I am afraid I didn't get all of that answer. Mr. Reporter, will you read that answer.

Try to keep your voice up.

(The last answer was read by the reporter.)

THE WITNESS (continuing). Well, they called several times at work. And I talked to Bill in the meantime.

Q All right. What conversation did you have with the defendant? What conversation did you have with the defendant Greene when you say you talked to him in the meantime?

A He told me he didn't have anything at the time, and I would have to tell them either to call me later that afternoon or that evening.

Q Did there come a time, after you had a conversation with the defendant Greene, that you either saw or talked to the Agent Fialkewicz again that day? (28)

A Fialkewicz called me at work several times, and I told him that I was unable to do anything at the time, and for him to call me at home.

Q And did he call you at home?

A Yes, he did.

Q Can you tell us the approximate time he called you at home?

A No, I don't recall.

Q As a result of the conversation that you had with Fialkewicz while you were at home, what did you do or where did you go?

A Well, I believe I told him to meet me at Brentwood Village. And then I went over to Bill Greene's house.

Q By "Bill Greene," you mean the defendant here? Is that right?

A That is right.

Q And he lived at that time where?

A Fourteenth and Michigan Avenue, Northeast. And I went over to Bill's house, and we drove up to the village. And he gave me 20 to 30 caps to give to the agent, Fialkewicz.

Q And who gave you that?

A William Greene.

Q Did there come a time when you did arrive at the Brentwood Village? (29)

A Yes. We met Fialkewicz and Tremoglie, whatever his name is -- I am not certain -- and I gave them part of what they were supposed to receive, and told them I didn't have the rest of it at the time, and I would meet them down in front of the Crescent later on that night.

Q You gave them how many caps?

A It was 20 to 30 there. I am not positive.

THE COURT. You gave them to whom?

THE WITNESS. To Agent Fialkewicz,

THE COURT. Where?

BY MR. MC LAUGHLIN:

Q And that is located where?

A Between 13th and 14th, on Rhode Island Avenue, Northeast.

Q In the District of Columbia?

A That is right.

Q And what conversation did you have with Agent Fialkewicz after giving him the caps of heroin?

A I told him to meet me at the Crescent Restaurant later on that night, and maybe I would have the rest of it then. Well, in the meantime --

Q After you had that conversation with Fialkewicz, where were you?

What I mean by that, were you on the pavement, or were you in anyone's auto? (30)

A I got out of Bill's car and met the agent in front of the theater.

Q When you say "Bill," you mean the defendant William Greene?

A That is right.

Q After you turned over the caps to the agent, Fialkewicz, then where did you go?

A I got back into Bill Greene's car.

Q Where did you go after getting back into Bill Greene's car?

A I went back over to his house, and then we went downtown to a --

Q When you got back in Greene's car to drive back to his house, did you have any conversation, that is, any talk with him?

A I just told him I told the agent I would meet him later on down at the Crescent.

Q Did there come a time later that night when you did meet the agent Fialkewicz?

A Yes. Bill and I drove downtown; I guess it was around twelve-thirty or one o'clock.

Q When you say "Bill," you mean the defendant Greene?

A That is right.

Q And what time did you say you drove downtown that evening?

A It was around 12:30 or one. I know it was real late.

(31)

Q That is, a.m., in the morning?

A That is right.

Q And whereabouts downtown did the defendant drive you?

A Down to the Crescent Cafe.

Q And the Crescent Cafe then at that time was located where?

A At 14th and New York Avenue, Northwest.

(31)

Q And that is in the District of Columbia?

A That is right.

Q And what happened when you arrived down in the vicinity of the Crescent Inn?

Q Well, Bill parked across the street. And I got out of the car and I saw the agent standing over in front of the Crescent. And I started crossing the street, and Bill followed some distance behind me.

Q When you say "Bill," you mean the defendant here?

A That is right. And I told the agents that I couldn't do anything that evening, and to call me the next day and I would give them the remainder.

Q The remainder of what?

A Of heroin.

Q While you were talking to the agents on the sidewalk, in front of (32) the Crescent Restaurant or Inn, did you see the defendant Greene any time?

A Yes. He walked across the street and passed by us, and I met him around the corner, I think in a drugstore some place around there on the side of the corner.

Q You mean he passed you on the same side where you were talking to the agents?

A He passed by.

Q And after you had this conversation with the agents, did you see Greene again?

A Yes. And then he drove me home that night. And he told me I could get the rest of it the next day. But the agents had said they would be out of town Saturday. This was on a Friday. They said they would be out of town on Saturday, and would call me Sunday. So I got the remainder of it from Bill Greene Saturday.

Q All right. And Saturday would be what? The 22d?

A I guess so, if Friday was the 21st.

Q After you received capsules from the defendant, you say on the 22d, did there come a time you saw Agent Fialkewicz?

A I saw him Sunday morning.

Q And where did you see him?

A He came to my home.

Q And at approximately what time? Could you tell us?

(33)

A It was between 11 and 12.

Q And when Agent Fialkewicz came to your home on January 23d -- and (33)
your home, by the way, at that time was located where? Was it in Washington,
D. C.?

A Yes.

Q All right. And what happened when Agent Fialkewicz came to your home
on January 23d of 1955?

A I gave him, well, 35, 37 capsules of heroin -- somewhere in that
amount.

Q And where did you get that heroin from?

A I had gotten it from William Greene Saturday.

Q Now, recalling your attention to the 29th of January, did there come
a time when you saw Agent Fialkewicz on that date?

A The 29th of January?

Q Yes, ma'am.

A Yes.

Q Now, on that particular date of the 29th of January of 1955, did you
actually see Fialkewicz in person that night, that is, for the first time, or
the first time that night, or did you talk to him by telephone?

A I talked to him on the telephone.

Q Do you recall what the conversation was on the telephone?

A He wanted to purchase some heroin. So I don't remember exactly how (34)
the conversation went. But I told him to call me back later on at the house.
But I had left my home before he did call back.

Q When you left your home, before Agent Fialkewicz called back, did
you give anyone at your home any instructions?

A Yes.

Q And when you left your home, did you leave any telephone number
there?

A I left Bill Greene's phone number.

Q And can you recall what the telephone number was?

A It was a Lawrence number.

Q When you left your home, on January 29th, and you left the defend-
ant's phone number at your home, where did you go?

A I went over to Bill Greene's house.

Q And Bill Greene at that time was living where?

A Fourteenth and Michigan Avenue, Northeast.

Q And did you enter his house that evening?

A Yes, I did.

(34)

Q And who did you see in there?

A There were several people there, and Bill Greene.

Q Was Greene one of them?

A Yes, he was.

Q While you were at the Greene home on that particular night, did there come a time when you talked to Fialkewicz? (35)

A Yes; he called there.

Q Who called?

A Fialkewicz.

Q And did you have any conversation with Fialkewicz when he called?

A Yes; he wanted to know if he could purchase some heroin.

Q While you were talking to Fialkewicz at that time over the telephone, where was the defendant Greene?

A He was standing near the phone.

Q And while you talked to Fialkewicz, did you have an occasion to talk to the defendant Greene?

A Yes; I believe Fialkewicz asked if I could -- I think he said he had eighty or a hundred dollars. I don't remember the exact amount. I remember one time it was 80 and one time it was 100.

So I turned around and asked Bill if he could get that amount of heroin that evening. And he told me to make arrangements with the fellow to meet him a couple of blocks away from his home.

Q From whose home?

A From Bill Greene's home. And to get the money from him. Then I was to give it to Bill and he was to get the heroin and make the exchange again. (36)

Q After you had that conversation with the defendant Greene in his home, did there come a time when you left the defendant's home --

A Yes.

Q -- that night? And where did you go?

A Drove about two or three blocks and parked. I don't know what the name of the street is. It is on 14th and, about two blocks away from there. I don't know.

Q From where?

A From Bill Greene's house.

Q And how did you get to that spot where you went to?

A Bill Greene drove me.

Q And when you went, that is, when you drove, the defendant drove you (36)
those two blocks away from his house, did you see Agent Fialkewicz?

A Yes. His car was parked there, and we parked I think directly in front of it. And Fialkewicz started out of the car, and before he got to the car I got out and got in his car and got the money from him.

Q How much money did you get? Do you recall?

Q I am not positive. It was either eighty or a hundred dollars. I am not sure.

Q And when you got that money from Agent Fialkewicz, what did you do or where did you go?

A Bill had driven off by that time. (37)

Q When you say "Bill," you mean who?

A William Greene. So the agent drove me back to his house and I got out of the car and went back in to Bill Greene's house. And I gave him the money.

Q You gave him what money?

A The money.

Q Is that the money received from Agent Fialkewicz?

A That is right.

Q When you received that money from Agent Fialkewicz, did you give him anything for the moneys?

A At that time I gave him some of the heroin.

Q Do you recall the approximate amount?

A It was around 20 or 25 capsules. I am not sure.

Q And where did you get those 20 or 25 capsules from?

A From Bill Greene.

Q That is, the defendant here?

A That is right.

Q After the 29th of January --

Oh, on that transaction you are talking of now, the \$80 you received from Fialkewicz and you turned over 20 capsules, were you to turn over more narcotics to him for the \$80?

A I told Fialkewicz to call back at that number later on that evening.

Q What number? (38)

A The Lawrence exchange, Bill Greene's house, and I would have the remainder of the heroin at that time.

Q And did Fialkewicz call back at those premises?

A He called back several times. And Bill Greene had gone out; and (38)
the last time Fialkewicz called, he was just walking in the door.

Q Who was walking in the door?

A Bill Green.

Q And what happened then?

A I made arrangements with Fialkewicz then to meet him again and to
give him the remainder of the heroin.

Q And did you meet Fialkewicz that evening after you say the defendant
Bill Green came in the house? Then did you meet Fialkewicz?

A Yes.

Q And can you recall the approximate place where you met Fialkewicz?

A The same place I had met him before, the same evening.

Q That is about two blocks away from the home of the defendant?

A That is right.

Q And that was in the District of Columbia? Is that right?

A That is right.

(39)

Q And how did you get to that immediate vicinity? Do you recall?

A I was driven about a block away from there, and then I walked down
another block.

Q In whose car were you driven?

A It was Bill Green's car.

Q When you arrived there about two or three block from the home of the
defendant, did you see Agent Fialkewicz?

A Yes, I did.

Q And did you turn over anything to Agent Fialkewicz?

A Yes, I did.

Q How much did you turn over? What did you turn over to him?

A I gave him heroin.

Q Do you recall how many capsules you turned over to him?

A I guess there were 30- or 40-some. I don't recall the amount.

Q And where did you get those capsules from?

A From William Greene.

Q That is the defendant in this case?

A That is right.

Q Let me ask you this: While around December the 23d of 1954 did there
come a time when you met Agent Jackson?

A I don't recall him by name. I might by sight.

(40)

MR. MC LAUGHLIN. Bring Jackson in and stand him in the door. (40)

(A man was brought in the door, where he stood briefly and then left the courtroom.)

BY MR. MC LAUGHLIN:

Q Do you recall seeing that man before -- Mr. Jackson?

A I can't positively identify him; but he looks like the fellow that was over at Bill Green's house.

Q How did you come -- that is, were you at Bill Green's house on an occasion when you saw the man you say looks like this man?

A I was at home when Jackson was at Bill Greene's house.

Q And did there come a time when you went to Bill Greene's, the defendant's, home?

A Yes. Bill Greene called me up and asked me to come over and meet him.

Q To meet whom?

A He didn't say. He just asked me to come over to meet someone.

Q Just how did he say that, Miss Floyd?

A I don't recall the exact conversation. But I remember him calling me up and asking me to come over.

Q That he wanted you to do what?

A I can't say definitely what the conversation was. But I know he (41)
asked me to come over.

Q To meet someone? Is that what you said?

A I said that before. But I can't be positive he said to meet someone.
But he invited me over.

Q When you did come over to his home, did he introduce you to Jackson?

A When I walked in the front door, the man I saw over there was sitting on a chair and I came in and he introduced me to him.

MR. MC LAUGHLIN. I believe that is all I have of this witness, Your Honor.

CROSS EXAMINATION

BY MR. LEVIN:

Q Barbara, how old are you?

A Twenty-two.

Q And how long have you lived in Washington?

A All my life.

Q And how long have you known Mr. Greene?

A I met him the first part of the summer of 1954.

Q And what was the nature of your relationship with Mr. Greene? (41)

A We were friends at the time.

Q And by "friends," what do you mean?

A You might not even call it a friendship. It was an acquaintance. (42)

Q How did you happen to meet Mr. Greene originally?

A Someone had called me on the phone and told me they had someone they wanted me to meet.

Q And who was this someone?

A Bill Graves.

Q When Mr. McLaughlin asked you whether you used dope yourself, between the period of December 11, 1954 to January 14, 1955, you answered yes. Have you ever used dope at any other time in your life?

A Would you repeat that, please?

Q Mr. McLaughlin asked you whether or not you had used dope during the period December 11, 1954 through January 14, 1955. Your answer was yes. Now I am asking you, have you ever used dope at any other time in your life?

A I used it before December of 1954, yes.

Q When did you first start using dope?

A I had used heroin once before I met Bill Greene.

Q And when was that?

A It was either the first part of 1954 or the last part of 1953. I can't be definite about the time.

Q And was that here in Washington?

A That is right.

Q Mr. Greene didn't get that dope for you, did he?

A No, he did not.

Q Who got that dope for you? (43)

A Bill Graves. I didn't ask for it.

Q What kind of dope have you been using, or did you use?

A I smoked marijuana.

Q When was this?

A It was in 1953, 1954. But I had never used narcotics.

Q When you say you smoked marijuana in 1953, do you mean that is the time when this Bill Gray gave you narcotics?

A That is right.

Q And that is the only time you ever smoked marijuana?

A That is right.

Q Since January 14, 1955, have you used any narcotics or dope of any type? (43)

A Since January 14?

Q Nineteen fifty-five.

A Yes, I have.

Q When was the last time you used any narcotics?

A I can't recall the date.

Q Can you make an approximation?

A It has been quite some time.

Q There came a time when you were arrested in this matter, did there not?

A Yes.

Q What was the date of your arrest? (44)

A It was in February. I don't recall the exact date.

Q February of 1955?

A That is right.

Q Since that date in February, 1955, have you used dope?

A Yes.

Q What was the date or days that you used dope since that time?

A I don't recall the exact dates.

Q Can you give us an approximation?

A It was shortly after it happened.

Q Shortly after the arrest?

A Yes.

Q And how many times did you use dope since your arrest?

A I guess it was about three or four times.

Q Were you out on bond after your arrest?

A Yes, I was.

Q Other than the use of marijuana, have you used any other type of dope?

A I may be wrong, but I don't think marijuana is a narcotic. I have used narcotics, yes, after the arrest.

Q What type of narcotics did you use?

A I used heroin. (45)

Q And how did you take this heroin?

MR. MC LAUGHLIN. I can't see the materiality of that, Your Honor.

THE WITNESS. I shot it.

BY MR. LEVIN:

Q And by "shot it," what do you mean?

A I injected it into my veins.

Q With what?

A With a syringe and a needle.

Q A hypodermic syringe?

A That is right.

Q And was this hypodermic syringe your own?

THE COURT. I think that we are going a little far afield. Of course you have a right to establish that she is an addict. In fact, she admitted it in the direct examination. That of course goes to credibility. But as to the details as to how she did it, I think that is absolutely immaterial. All it does is to put the witness to an unnecessary ordeal. I am going to exclude that.

BY MR. LEVIN:

Q Now do you know what the expression "hooked" means?

A Yes, I do.

Q What does that mean?

A It is when someone is addicted to narcotics and can't do without (46) it, and when they do they have withdrawal symptoms.

Q Have you ever been "hooked"?

A I have never been addicted to narcotics in the sense that when I stopped using it I had any withdrawal symptoms whatsoever.

Q Did you have the desire to use the narcotics again?

A I don't know if you would call it a desire or not. Maybe it was weakness. I don't know what you would call it.

Q Have you used any narcotics today?

A No, I have not, and I would be willing to submit to an examination.

Q Have you used any narcotics within the past week?

A No, I have not.

Q This person whom you have mentioned as Bill Gray —

A Yes.

Q -- was he a white or colored man?

A He was colored.

Q And what was the nature of your relationship with him?

MR. MC LAUGHLIN. I am going to object to this, Your Honor.

THE COURT. I think that question is indefinite. I am going to sustain

the objection. If you want to make your question more specific, that might (46)
be different.

BY MR. LEVIN: (47)

Q Was Bill Gray your boyfriend?

MR. MC LAUGHLIN. I object to this, Your Honor. I can't see the
materiality.

Well, let her answer it.

THE WITNESS. No, Bill Graves definitely was not my boyfriend. I
purchased marijuana from Bill Graves, and that was the extent of our relation-
ship.

BY MR. LEVIN:

Q Was Mr. Greene here ever your boyfriend?

A As God is my judge and witness, we were never boyfriend and girl-
friend.

THE COURT. I think the witness is entitled to be protected against
unnecessary aspersions. Unless counsel can show the Court there is some
foundation for questions of that kind, they should not be asked.

MR. LEVIN. Yes, Your Honor.

THE COURT. They shouldn't even be asked. Of course I am going to
exclude them; but they shouldn't have been asked.

MR. LEVIN. The basis, Your Honor, is the indictment itself.

THE COURT. Just a moment. You may not make any statements in open
court.

BY MR. LEVIN:

Q Did you ever tell any one of these men, whom you now know to be (48)
agents of the Treasury Department, that Mr. Greene was your boyfriend?

A I definitely did not tell any of them that he was my boyfriend; but
I imagine they took it for granted.

Q The question is, did you yourself ever tell them --

A I never told them.

Q -- that he was your boyfriend.

A No, sir. I never told anyone that Bill Greene was my boyfriend.

Q Does the name Ronald Doremus mean anything to you?

A Yes, I know a Ronald Doremus.

Q And how do you happen to know Ronald Doremus?

MR. MC LAUGHLIN. I am going to object to this, Your Honor.

THE COURT. Objection sustained.

Q Isn't it a fact that you on occasions, since your arrest, have written to Ronald Doremus about this case?

A Yes; I corresponded with Ronald Doremus.

Q And you discussed with him, did you not, the details of your participation in this activity?

A No, I did not discuss, go into detail with him in my letters. But I wrote him in generality what he could have read in the paper about the case. Anyone could have read that. It was in the paper.

(49)

Q And where did you write to Ronald Doremus?

A Ronald Doremus is in Jessup's Prison for Men.

Q And do you know why he happens to be there?

MR. MC LAUGHLIN. I am going to object to that, Your Honor.

THE COURT. Objection sustained.

MR. MC LAUGHLIN. I don't think it is proper, unless we get the letters and look at them.

BY MR. LEVIN:

Q Did you ever engage in any dope or narcotics or marijuana activities with Ronald Doremus?

THE COURT. Just a moment.

MR. MC LAUGHLIN. I am going to object to this, if Your Honor please.

THE COURT. I am going to sustain the objection to that.

Will counsel come to the bench.

(At the bench:)

THE COURT. I want to remind counsel of the inexorable rule that prevails in the Federal courts as to cross-examination as to credibility, that you may not inquire of a witness concerning any criminal acts other than those involved in the case on trial, unless those criminal acts were followed by conviction.

In other words, you may ask a person whether he was convicted (50) of larceny -- just by way of illustration -- but you may not ask him whether he ever stole anything.

MR. LEVIN. I understand that, Your Honor.

THE COURT. In some of the states the rule is more lax.

MR. LEVIN. The purpose of this, Your Honor, is that she has given the impression to the jury that almost her entire activity with narcotics during this period was with the defendant Greene.

THE COURT. In the first place, I am inclined to differ with (50)
counsel. I gathered no such impression. And I don't know how counsel can
state what impression she gave to the jury. You can state your own impression.
Certainly the Court's impression is otherwise. But even so, let us assume she
was buying other narcotics from other people, and you desire to show other
violations of the narcotics laws. That would not be admissible.

MR. LEVIN. I may very well be able to do this by cross-examination
showing that some of the deliveries to the agents she made, and it is admitted
she made, did not come from Greene but from another source. In fact, my
investigation indicated she went to York, Pennsylvania, during this period.

THE COURT. I will not permit you, the Government having objected, (51)
to go into her transactions with other people, because the Federal rule is
otherwise.

You may proceed, gentlemen.

MR. LEVIN. May I ask Your Honor this question? If I am able to show
that the narcotics she is discussing now came from another source --

THE COURT. You have a right to do that. But the rule as to cross-
examination must still be observed. You can introduce evidence showing that
it came from another source, of course.

MR. LEVIN. If she is the sole source of the evidence, I think I have
a right to ask her.

THE COURT. You can call her as your own witness, at the proper time.
But I still have to confine the cross-examination within proper channels.

(Counsel having returned to trial tables:)

THE COURT. You may proceed, Mr. Levin.

BY MR. LEVIN:

Q Did any of the narcotics or the dope which you have mentioned as
being delivered by you to the federal agents come from a source other than Mr.
Greene?

A No, it did not.

Q Did you have access to another source?

A I knew no one that I could purchase it from, that I would go to and
purchase it from.

Q Did you at any time ever indicate to any of the federal agents (52)
that you had made a trip to New York with Mr. Greene?

A Yes, I did.

Q And when was that trip supposed to have been made?

A Oh, it was either in December or January. Maybe it was before. (52)
I cannot remember the definite date.

Q Did you make that trip?

A Yes.

Q And you went with Mr. Greene to New York?

A That is right.

Q Where did you stay when you went to New York?

A I stayed in a hotel.

Q With Mr. Greene?

A Yes.

Q In the same room?

A It was a two-bedroom place. We drove around for approximately an hour. It was on a holiday, I remember now. It was on a holiday, and I said we would get a place that had a different room. And he said he had made reservations in a hotel on Park Avenue. I don't recall the name of it. And I said "Well, I am sorry for the inconvenience." And we drove around for an hour looking for a double place, and we finally came to one. And we registered in a double bedroom. I stayed in one room and Bill Greene stayed in another room. (53)

Q For the entire night?

A The entire night -- the whole time we were there.

Q During this period did you make any other trips with Mr. Greene?

A Yes, we made one other trip.

Q Where was that to?

A To New York.

Q Can you remember the approximate date of that trip?

A I don't remember the dates at all.

Q Was that before or after the trip that you were speaking about earlier?

A Prior to that; before, it was.

Q Prior to that. And at that time where did you stay?

A In a hotel.

Q In the same room?

A No.

Q Separate rooms?

A No. I beg your pardon. We did stay in the same room. He knew about three people that came up to that room, and we stayed up all night with those

three people in the room with us. We were never alone at any time in that room. (53)

Q You never went to bed that night?

A No. We stayed up the whole night.

THE COURT. I have indicated that I am not going to permit aspersions of that kind to be cast on this witness by insinuation, Mr. Levin. I don't think it is relevant. I don't think you should do that. (54)

We will take our luncheon recess at this time.

(At 12:30 p.m. the luncheon recess was taken until 1:45 this afternoon.)

- - -

AFTER RECESS

(At 1:53 p.m., following the disposition of other Court business, the trial was resumed and proceeded as follows:)

THE COURT. The witness Barbara Floyd was on cross-examination. You may proceed.

BY MR. LEVIN:

Q Barbara, direction your attention to the days on which you said you delivered dope to various federal agents, on those days were you ever under the influence of dope or narcotics?

Do you understand the question?

A Yes, sir. I was just trying to think back to the days I did deliver it to them.

Q If I would suggest dates, would that help?

A I can't remember dates. I would have to remember the actual things that went on.

Q Say on or about January 14. (55)

A Never when I actually gave them the narcotics, I wasn't under the influence of narcotics at the time.

Q Well, had you used any narcotics at that time or just prior to that?

A What do you mean? Before? You mean used the narcotics before I went to give the agents the narcotics?

Q That is right.

A No.

Q On the times on which you say you received cash from the agents, were you under the influence of narcotics?

A No, because they picked me up at work the first time, and I never

used narcotics while I was working. And I gave them narcotics that time. (55)

And the other time I made the exchange, they gave me the money in the morning. And I don't recall ever using narcotics when I was accepting the money or giving the money.

Q You have used the expression "working." Are you employed now?

A Yes, I am.

Q And where are you employed, and what do you do?

A Do I have to give the name of the corporation?

Q No; tell us the type of work you do.

A I do secretarial work.

Q Are you a stenographer?

A I do secretarial work, shorthand, typing, and phone, and so forth. (56)

Q At the times of these alleged acts, how were you employed?

A I was doing stenographic work at that time.

Q And where were you employed?

A I was working at the Senate Building.

Q And for whom?

MR. MC LAUGHLIN. I object to this, Your Honor. I don't think it is material.

BY MR. LEVIN: (58)

Q Were you working for a United States Senator at the time?

A Yes, I was.

Q In your capacity as a stenographer or secretary?

A I was working as a stenographer at that time.

Q You mentioned several deliveries of items to federal agents or narcotic agents, which you have identified as being a type of narcotic. Do you have any particular training which enables you to identify this material as being a narcotic, dope?

A Do you mean at the time when I delivered it?

A Yes.

THE COURT. Mr. Levin, the Court, in the interests of saving time, might suggest to you that the Government of course must prove the contents of those alleged narcotics. Otherwise it does not have a case. I presume there will be chemical testimony.

MR. LEVIN. But as far as this witness is concerned.

THE COURT. As far as this witness is concerned, these narcotics (59)

will have to be traced to the chemist. I presume the Government is going (59)
to do that, and the chemist will testify as to the contents. This witness'
identification of these articles as narcotics of course is not evidence that
they are narcotics.

MR. LEVIN. Thank you, Your Honor.

THE COURT. That will have to be established scientifically.

BY MR. LEVIN:

Q When you were engaged in delivering these items to the federal
agents and receiving cash from them, what was your purpose in so doing?

A I thought the agent was addicted to narcotics at the time.

Q What was your personal motive?

A Well, if you mean if I received money for it, no.

Q Well, what was your reason?

A I felt sorry for the agent at the time.

Q And that is the only reason you delivered narcotics to him and
accepted cash from him?

A Yes.

Q Because you felt sorry for the agent?

A Yes.

Q Did you know what the narcotics would do to him if he used them? (60)

A I have seen what it does when they don't use it. It is hard to
explain to someone who has never been involved in it.

Q Are you trying to say something horrible happens?

A Let us say it isn't very pleasant.

Q Has that ever happened to you?

A No, I have never had any withdrawal symptoms.

Q Is that because you have never withdrawn from the use of narcotics?

A If you are saying that I am using narcotics at the time, I am not.

Q On the various dates that you said you conducted transactions with
the narcotic agents, did the agents ever see any narcotics or what you have
called narcotics in the possession of Mr. Greene?

A No, they did not, not while I was around. They never saw William
Greene actually hand me narcotics and me give him the money.

Q Did they ever see Mr. Greene transport any narcotics?

A What they saw I can't tell you. I don't know if they have ever
watched him or not. I don't know.

Q Did the agents ever see William Greene give you any narcotics?

A I have just said they haven't seen me personally accept it (61)
from Bill Greene, no.

Q Did the agents ever see you hand Mr. Greene any cash, which you received from them?

A I have stated before that the only thing that they could connect with us was when he drove me to Bill Greene's house and I in turn went in and gave Bill Greene his money and came out with the narcotics. They didn't actually see any transaction, to my knowledge.

Q By the way, are you married?

A No, I am not.

Q Have you ever been married?

A No, I haven't.

Q You were a joint defendant in this case, weren't you?

A That is right.

Q And you are the same Barbara E. Floyd who pled guilty to one of the counts in this indictment, on November 8, 1955?

A That is correct.

Q Isn't it a fact that in addition to the count to which you pled guilty, you were also indicted on other counts in this indictment?

A That is true.

Q Since your having pled guilty on November 8, have you been (62)
sentenced in this case?

A No, I have not.

Q Are you aware of the fact that there will come a time when you will be sentenced in this case?

A Yes, I am.

Q And have you been continuously aware of that fact since the date of your plea of guilty?

A Yes, I have been aware of it.

Q You were represented by an attorney in this case, were you not?

A That is correct.

Q And that attorney's name is Mr. Dietz?

THE COURT. Oh, I don't think we should go into that.

BY MR. LEVIN:

Q Do you know of your own personal knowledge what has happened to the other counts in this indictment to which you did not plead guilty?

A No, I do not.

Q Have you been told what will happen to them?

(62)

A No, sir.

Q Are you under the impression that there will come a time when you will be tried on those other counts?

A I have pleaded guilty. So I imagine my next step will be to be sentenced.

Q But do you understand you pled guilty to only one count in the indictment? (63)

A Yes.

Q And that there were many other counts in the indictment to which you did not plead guilty?

A That is right.

Q Is the reason that you did not plead guilty to the other counts because you were not guilty of those charges?

A I was advised by counsel and I did as he told me to do.

Q Were you advised by counsel to expect leniency?

A No.

THE COURT. I think this is invading the attorney and client relationship, Mr. Levin. What counsel has advised his client is privileged.

BY MR. LEVIN:

Q Are you under the impression personally to expect leniency in this case?

A I don't expect anything. I just want to get it over with. I don't care what happens.

Q Are you under the impression that by testifying in this case you may expect leniency?

A I don't expect anything by testifying. But I am not going to say that it was myself that went and purchased narcotics; that I was dealing in narcotics. I wasn't. I did not have any supply of this. I am telling you (64) actually what happened. Bill Greene will defend himself as I am trying to do.

Q Were you permitted to remain on bond after your plea of guilty?

A I was released on bond, yes.

Q And you are still on bond now? Is that right?

A That is right.

Q Are you under the impression that the counts to which you did not plead guilty in this indictment will be dismissed?

A I am not under any impression whatsoever as far as that is concerned.

I just do what my lawyer tells me to do, as far as pleading guilty or not (64)
guilty. As he has reviewed the case, I imagine he is the only one who can
tell me what to do.

Q Have you had occasion to speak to your attorney since testifying
in this case?

A You mean since this morning?

Q Yes.

A We had lunch together.

Q Did you receive any advice?

A We didn't discuss --

THE COURT. Any advice received from counsel is privileged.

MR. LEVIN. I am not asking what the advice was, Your Honor. (65)

THE COURT. The fact of receiving advice is in itself privileged.
If you were in that position, I would sustain your privilege, Mr. Levin.
That is a privilege of the highest sort, the relationship between attorney
and client, and physician and patient.

BY MR. LEVIN:

Q You have indicated that your relationship with Mr. Greene was not
for any romantic purposes. What was the purpose of your relationship with
Mr. Greene?

A I don't know if you would call any purpose to the relationship.

Q Well, during this period how often did you see Mr. Greene?

A I saw him quite often.

Q And, by that, you mean two, three, maybe four times a week?

A Sometimes, yes, and then sometimes I wouldn't see him for two or
three weeks.

Q At the time of these transactions, where were you living?

A At home.

Q And, by "at home," you mean with your mother?

A That is right.

Q At the present time, are you still living with your mother? (66)

A No, I am not.

Q Did Mr. Greene ever visit you at your house when you lived with
your mother?

A He had been there, on one occasion.

Q Inside of the house?

A My mother wasn't there at the time.

Q At the times you say you visited Mr. Greene at his home, were (66)
other persons present?

A Usually his grandmother is there. I guess that is what she is, his
grandmother. She was there all the time. And he has two aunts that were
usually there off and on.

MR. LEVIN. Would Your Honor bear with me for a minute?

THE COURT. Surely. Take whatever time you need.

BY MR. LEVIN:

Q Have you ever been in Mr. Greene's car when he wasn't present, or
used that car when he wasn't present?

A I can't recall offhand any occasion he ever gave me the car just
to drive around in it or to go anywhere in it.

Q Can you drive?

A Yes, I can.

Q Have you ever driven his car?

A Yes, I have.

Q And on how many occasions have you had the use of his car by (67)
yourself for your own purpose?

MR. MC LAUGHLIN. She has never testified, Your Honor, she had any.

BY MR. LEVIN:

Q Did you understand the last question?

A Yes, sir. I believe you asked if I had ever driven his car by
myself.

Q Yes; and what was your answer to that?

A I don't ever recall driving the car without anyone being in the car
at the time, and it was usually Bill.

Q Was there ever an occasion when Bill wasn't in the car?

A Not while I was driving it, no.

Q During this period you have mentioned two trips to New York, I
believe you said for the purpose of purchasing narcotics. Is that right?

A I didn't say what --

THE COURT. Just a minute. She testified about that before the noon
recess. Have you any further questions concerning it?

You are making a statement. Suppose you ask a question.

BY MR. LEVIN:

Q Were there any other trips you made out of town for the purpose (68)
of purchasing narcotics?

A No, there wasn't.

(68)

Q Was there ever an occasion when you went to York, Pennsylvania?

A York, Pennsylvania? Not that I recall offhand. I may have gone. But it must have been at least three or four years ago.

THE COURT. I am wondering how that is relevant. Of course you have a right to inquire of the witness concerning any matter brought out on the direct examination. Also you have a right to cross-examine her concerning credibility. I don't see how a question of that sort goes to either aspect of the matter.

THE WITNESS. I beg your pardon; but I do remember going to Pennsylvania. I don't recall whether it was York or not. But I did go up there about three years ago.

BY MR. LEVIN:

Q Was that for the purpose of buying narcotics?

A No; I didn't use narcotics at all at that time.

Q When you used these narcotics, what effect did they have upon you?

A Just relaxing, I guess you would call it. I just felt relaxed. I don't know.

Q Did you have a strong urge to use further narcotics at these times?

A No, I did not have a strong urge to use them, no.

(69)

Q Did you have any desire to use them?

A I don't know if you would call it a desire, or what. I just used it. I don't know what you would call it.

Q Were you taking the narcotics for medicinal purposes?

A No.

Q Were you sick at the time?

A No.

Q Can you give us any reason for your use of narcotics?

A I wish I did know the reason. I don't know. I just used it -- you know.

MR. LEVIN. I have no further questions, Your Honor.

REDIRECT EXAMINATION

BY MR. MC LAUGHLIN:

Q In regards to your plea in this indictment in which you are charged jointly, you pleaded to the first count, the conspiracy count; is that right?

A That is right.

Q That is, from December 11, 1954, and continuously thereafter until

A That is right.

Q My friend asked you the last question I don't believe you answered on cross-examination, as to what was the purpose of these two trips to New York with the defendant. Can you tell us what the purpose of going to New York with the defendant was on these two occasions? (70)

A To purchase narcotics.

Q When you say to purchase narcotics, after you arrived in New York, did the defendant Greene contact anyone for the purpose of purchasing narcotics?

A Yes, he did.

Q And how many people would you say he contacted in New York for the purpose of purchasing narcotics on these two occasions?

A One person.

Q My friend asked you whether or not you had used narcotics after you were arrested in February and were out on bond. Do you remember that question?

A Yes, I do.

Q When you were arrested in February and were out on bond, had the defendant been arrested yet in this case?

A No; he was out on bond shortly after I was, or some time.

Q In other words, after his arrest in this particular case, he was out on bond, too; is that right?

A That is right.

Q And that was a short time after your arrest?

A That is right.

(71)

Q Now, in response to a question asked by my friend, if at that time you were using narcotics, and I believe you said yes. Is that right -- when you got out on bond?

A Yes.

Q Who did you get those narcotics from that you used?

A Bill Greene.

Q From the defendant here?

A That is right.

MR. MC LAUGHLIN. I believe that is all I have to ask of this witness, Your Honor.

RECROSS EXAMINATION

Q You say on your trip to New York you went for the purpose of purchasing narcotics?

A That is right.

Q Did you make any purchases personally?

A I don't know anyone in New York that uses narcotics, or anyone that I could purchase it from.

Q Then what was the purpose of your going to New York, if you couldn't make any purchase of narcotics?

A It was just a trip to New York, for me.

Q Just a trip to New York?

A I don't have money to purchase narcotics, in that large amount, enough to finance myself to go up and to come back, and purchase them at the same time. (72)

Q But what was your personal reason for going to New York?

A I just told you. It was a trip to New York.

Q And you have no other explanation than that?

A No, I don't.

MR. LEVIN. No further questions.

MR. MC LAUGHLIN. I have nothing further of this witness, Your Honor.

THE COURT. You may step down.

MR. MC LAUGHLIN. May she be excused, subject to call, Your Honor?

THE COURT. Yes; the witness will be excused, subject to call.

JOHN L. KELLY, JR.,

called as a witness by counsel for the United States and being first duly sworn, was examined and testified as follows:

DIRECT EXAMINATION

BY MR. MC LAUGHLIN:

Q Your full name is what? (73)

A John L. Kelly, Jr.

Q And where do you live, Mr. Kelly?

A Greensboro, North Carolina.

Q And where are you employed?

A The Bureau of Narcotics.

Q And located where? Where are you assigned to?

A Greensboro, North Carolina.

Q Recalling your attention to December of 1954, where were you employed? (73)

A Greensboro, North Carolina.

Q And on the first part or the middle part of December of 1954, where were you assigned as a narcotic agent?

A Washington, D. C.

Q Recalling your attention to the month of December of 1954, and specifically I believe December 11 of 1954, did there come a time when you saw the defendant, Mr. Greene?

A Yes, sir.

Q And when and under what circumstances did you see Mr. Greene on December 11 of 1954?

A I met Mr. Greene in the Old Ebbitt Grill, on F Street, about 10 o'clock at night.

Q And is that in Washington, D. C.?

A Yes, sir.

Q How did you come to meet him there?

A I telephoned him at his residence and told him that I wanted to talk to him, and he made the arrangements to meet at the Old Ebbitt Grill. (74)

Q And what time did you say he arrived at the Old Ebbitt Grill?

A About 10 o'clock.

Q And at the time he arrived at the Old Ebbitt Grill, was there anyone with him?

A Yes, sir; there was.

Q And who was with him?

A Barbara Floyd.

Q And is she the person who just preceded you on the witness stand?

A Yes, sir.

Q Now, did you have any talk with the defendant, William Greene, at that time at the Old Ebbitt Grill?

A Yes, sir; I did.

Q And that talk was pertaining to what?

A That talk was pertaining originally to seeing about getting some, if he wanted to contribute some money to get a friend of his out of jail.

Q And that friend's name was what?

A John Kimer.

MR. LEVIN. What was that friend's name?

MR. MC LAUGHLIN. Kimer -- John Kimer -- K-i-m-e-r.

(74)

BY MR. MC LAUGHLIN:

(75)

Q And at the time you talked to the defendant did you have any communication from this Kimer?

A Yes, sir.

Q What did you have?

A I had a letter of introduction.

Q A letter of introduction to whom?

A To William Greene.

Q And what was the -- in other words, who were you represented to Greene as? What name was used?

MR. LEVIN. I am going to object to that, Your Honor, as hearsay.

MR. MC LAUGHLIN. No; this is in a letter.

THE COURT. Objection overruled.

BY MR. MC LAUGHLIN:

Q Were you referred to or mentioned in the letter?

A Yes, sir; as Jack Riley.

Q And at the time you talked to the defendant, William Greene, on December 11, did you have that letter with you?

A Yes, sir; I did.

Q And was that letter at that time shown to the defendant Greene?

A I gave it to Greene.

Q You gave it to Greene personally? Is that right?

A Yes, sir; and he read it and kept it.

Q At that time did you have any conversation with the defendant Greene about narcotics? (76)

A Yes, sir; I did.

Q And what was that?

A Well, I discussed with him the possibility of obtaining some narcotics for sale to raise money for this man Kimer's bail.

Q And what did the defendant say to that?

A He told me that he would call me the next day.

Q Did you have any conversation with Greene at that time as to where you were stopping here in Washington?

A Yes, sir; I did.

Q And where did you tell him you were stopping?

A I told him I was stopping at the New Colonial Hotel.

Q And the New Colonial Hotel is located where?

(76)

A At 15th and M Street.

Q And that is in Washington, D. C. Is that right?

A Yes, sir.

Q After that conversation with the defendant on December the 11th, did there come a time when you did hear from him again?

A Yes, sir, the next day.

Q And by what means?

A At one o'clock December 12th he telephoned me at the hotel and asked me to meet him at the California Kitchen, at 15th and K, or 14th and K, at three-thirty that afternoon. (77)

Q And then did you meet him that afternoon?

A Yes, sir; I did.

Q And you say at 14th and K, the California Kitchen. Are you familiar with that immediate section of the city?

A Well, I am not from Washington.

Q Let me ask you this. Do you know where the Hamilton Hotel is?

A No, sir; I don't.

Q Do you know where the Ambassador Hotel is?

A Yes, sir.

Q Was the California Kitchen you refer to in that immediate vicinity?

A It is on the next corner. It is on the next corner from where the hotel is.

Q That would be 15th and K? Is that right?

A That would be 15th and K.

Q And did you meet the defendant Greene at the California Kitchen on December 12th?

A Yes, I did.

Q And did you have any further conversation with him at that time in reference to narcotics?

A Yes, sir. I discussed --

Q And what was that?

A I discussed with him the possibility of purchasing some narcotics (78) from him. I told him I had a market for narcotics in North Carolina, and that I knew he was a, what they call a "connection," that is --

MR. LEVIN. I am going to object to that, Your Honor, and move it be stricken from the record.

THE COURT. Just confine yourself to stating what he said to you (78)
and what you said to him.

THE WITNESS. Yes, sir; that is what I was doing.

THE COURT. Oh, very well. I thought the witness was discussing the
operation of his mind. Then I will overrule the objection.

MR. LEVIN. May we approach the bench, Your Honor?

THE COURT. No; I overrule the objection. I will let the witness
testify to what he said to the defendant and what the defendant said to him.

MR. LEVIN. But that wasn't an answer, Your Honor.

THE COURT. We will proceed.

BY MR. MC LAUGHLIN:

Q Mr. Kelly, in this conversation that you had with the defendant, I
want you, as near as possible, to use your exact words and the defendant's
exact words, as he spoke. Do you understand what I mean?

A Yes, sir. I asked Greene about purchasing some narcotics from him.
He told me that he would not deal directly himself, but that he would deal
through someone; that he wouldn't handle it himself directly, but that he (79)
would give the instructions and the directions on it. And he said "If you want
to deal with me, you will have to do it through Andrea Rogers."

Q Did you have any further conversation with him at that time?

A We made arrangements that he was going to telephone me at the hotel.
But no definite time or date was set for the call.

Q After that particular incident, did there come a time when you
talked to the defendant Greene again after December 12th?

A I spoke to him on the phone again on December the 13th.

A All right, sir. And where was the defendant at the time you spoke
to him on December 13 of 1954? Is that right?

A Yes, sir. He telephoned me at the hotel, the New Colonial Hotel,
about six p.m. on December 13th, and told me that he had Andrea Rogers there
and he was sending her over to the hotel to talk to me.

Q Talk to you about what?

A About Kimer.

Q Did there come a time when you had some conversation with the
defendant -- I will withdraw that.

Did you stay in Washington after that conversation you had with the (80)
defendant on the 13th of December?

A No, sir. Other business --

Q Did you leave Washington?

A Yes, sir; I left Washington.

Q When did you leave Washington, after December 13th?

A I left Washington on the 15th of December.

Q When you left Washington on the 15th of December, did you at any time tell the defendant Greene that you had left or intended to leave Washington?

A No, sir.

Q After you left Washington on December 15th of 1954, where did you go?

A I had another case in New York. I had to go to New York City.

Q Did there come a time, after you left Washington on December the 15th, 1954, when you had an occasion to talk to the defendant Greene again after that 15th of December?

A Yes, sir.

Q And when was that? Can you recall?

A Yes, sir. It was on December 22d.

Q And where were you on December 22d.

A Greensboro, North Carolina.

Q And how did you talk to the defendant Greene on December 22d, 1954?

A I placed a person-to-person telephone call to him in Washington. (81)

Q And as a result of that did there come a time when you actually talked to him?

A Yes, sir.

Q On that same date?

A Yes, sir.

Q And what conversation did you have with Greene on December the 22d of 1954?

A I told Greene I wanted to purchase some narcotics. And he said "Well, you are talking."

And I said "Well, I want to buy about two ounces."

He said "All right; but it will be \$600."

And I said "You mean for the two ounces it will be \$600?"

He said "No; it is \$600 apiece," he says, "but it is pure."

I asked him if I could cut it four times. He said "You can cut it better than that."

So I asked him how we could work the deal -- was he going to come

and deliver it to me in Greensboro. And he said "No; you come to Washing- (81)
ton."

And I told him it was impossible for me to come to Washington,
but that I had a man I could send up to see him. And he said "Well, wait a
minute. What does this man look like?" (82)

And I told him he was a colored boy that worked for me, named
Willie James. So he said "That sounds all right to me. Have him call me at
five o'clock tomorrow afternoon and I will give him directions and instruc-
tions on how the deal will get done."

Q Is that the entire conversation you had with him at that time?

A Yes, sir.

Q That is on December 22d?

A Yes, sir.

Q On December 23d of 1954, where were you?

A Greensboro, North Carolina.

Q And while in Greensboro, North Carolina on December 23d of 1954,
did you have an occasion to talk to the defendant Greene?

A Yes, sir.

Q And by what means?

A I received a telephone call from Agent Jackson.

Q And, by the way, Agent Jackson, was he the man --

A Agent Jackson was the man that I told him worked for me, named
Willie James. That was the name used by Agent Jackson.

Q On December 23d, while in North Carolina, you say you received a
telephone call from Willie Jackson?

A Yes, sir. (83)

Q And as a result of that call did you talk to anyone?

A Yes, sir; I talked to Greene.

Q When you say you talked to Greene, did you put in a call for Greene,
or was it a continuation of the conversation that you had with Jackson?

A It was a continuation of the conversation I had with Jackson.

Q All right. And what conversation did you have with Greene at that
time -- the defendant?

A I asked Greene what he was trying to pull, because the night before
when I talked to him it was agreed that my man would come there and give him
the \$600 for an ounce of heroin, and Greene would deliver it.

At this time when Agent Jackson called me, he told me that Greene

wanted the \$600 and that he would make delivery in a day or two. That is (83)
when I asked to speak to Greene, and Greene got on the phone. And I told him
that I didn't like what he was trying to pull; that I sent my man up there
and he had the money and we were ready to do business.

He said "Well, tell him to leave the \$600 with me and I will give
him the stuff tomorrow." And I said "No." I said "He gets the stuff right now
or you don't get the money."

And we had quite an argument on the phone. And as a result of it (84)
I told him to put Jackson back on the phone, and I told Jackson not to deal
with him.

Q And at that time, as far as you knew, did Greene know you were a
narcotic agent?

A No.

MR. MC LAUGHLIN. I believe that is all I have of this witness, Your
Honor.

THE COURT. Is there any cross-examination?

CROSS EXAMINATION

BY MR. LEVIN:

Q Mr. Kelly, at any time on the dates of December 11, 13th, 22d or 23d,
on which you state you had some transaction with Mr. Greene, did you ever see
him in possession of any narcotics?

A No, sir.

Q Did you ever give him any money?

A No, sir.

Q Did you ever see anyone else give him any money?

A No, sir.

MR. LEVIN. No further questions, Your Honor.

THE COURT. You may step down.

(The witness John L. Kelly, Jr. left the stand.)

MR. LEVIN. May counsel approach the bench?

THE COURT. Yes indeed.

(At the bench:)

MR. LEVIN. When this witness was testifying on direct examination, (85)
he made a statement that he had been advised that Mr. Greene was a known dope
operator; and that is a clear statement of hearsay. I entered an objection at
the time, and that was what my objection was to, Your Honor. I think a check
of the transcript will indicate that is definitely what he said.

THE COURT. I directed the witness to confine himself to stating (85)
what he told Greene and what Greene said to him.

MR. MC LAUGHLIN. Sure, in that conversation. He didn't mention that
in that conversation.

MR. LEVIN. But in the prior conversation, when the objection was
made --

THE COURT. But you didn't note any objection.

MR. LEVIN. I think the record will show the objection was made.
And on the basis of his having made that statement, I move for a mistrial.

THE COURT. Oh no. Motion denied. However, I am perfectly willing
to instruct the jury to disregard that statement, if it was made.

MR. LEVIN. I certainly would want that. But at the same time I
don't feel that would cure the damage that has been done.

THE COURT. I don't recall that statement. But even if it was made, (86)
I am not going to grant a mistrial, because I don't believe in putting jurors
in cellophane.

MR. MC LAUGHLIN. I don't remember him saying it.

THE COURT. Mr. McLaughlin's recollection is the same as the Court's.
Maybe it would be better for me not to advise the jury of that, because it
might put the thought in their minds that may not be there.

MR. LEVIN. As I say, if what they heard has been so damaging --

THE COURT. But Mr. McLaughlin says he didn't hear it, and the Court
didn't hear it.

MR. LEVIN. I think the record would be the best proof of it.

THE COURT. I am not going to have the record transcribed. The
defendant can order the record, if he wants it.

Let us proceed, gentlemen.

But even so, I think it is innocuous, because what is important is
what transpired.

MR. LEVIN. There was one other point I wanted to make. The witness
described conversations which he had with Greene on the 22d and on the 23d as
to the prospective purchase of narcotics and the \$600.

THE COURT. What is your application?

MR. LEVIN. The application is that he had no right to bring in (87)
that type of testimony, because there is nothing in this indictment which ties
in with those conversations.

THE COURT. It is too late now to note any objection. You have to

note objections at the time the testimony is offered and not after the witness leaves the stand. I haven't a transcript before me, obviously.

(87)

And I want to add this. This is a conspiracy indictment, and that would bear on the issue of conspiracy.

MR. LEVIN. If this is the conspiracy he is talking about. But if there is a separate conspiracy between the agent --

THE COURT. I can't tell that until after the evidence is in.

MR. LEVIN. But I think Your Honor understands my position.

THE COURT. Yes. I have ruled. I can't tell whether the Government is going to make out its case or not. This is admissible to prove the conspiracy. It may be it will not make out the conspiracy; but it is admissible to prove it.

Let us move on. Call the next witness.

WILLIAM R. JACKSON,

(88)

called as a witness by counsel for the United States and being first duly sworn, was examined and testified as follows:

DIRECT EXAMINATION

BY MR. MC LAUGHLIN:

Q Your full name is what?

A William R. Jackson.

Q And where do you live, Mr. Jackson?

A Baltimore, Maryland, sir.

Q And what is your occupation?

A Federal Narcotic Agent.

Q And during the month of December of 1954 what was your occupation?

A Federal Narcotic Agent.

Q And during the month of December of 1954 where were you assigned as a Federal narcotic agent?

A Washington, D. C., sir.

Q Now on December the 22d of 1954 -- just answer this yes or no -- did there come a time when you talked to Agent Kelly?

A Yes, sir.

Q And at that time that you had the conversation with Agent Kelly, did you receive certain instructions? Just answer that yes or no.

A Yes, sir.

Q And as a result of the instructions you received from Agent Kelly (89) on December 22d of 1954, where did you go or what did you do?

A The following day, December 23d, at or about seven p.m., here (89)
in Washington, D. C., I called William C. Greene on the telephone, told him
my name was Billy James, and I have just drove up from North Carolina. He
gave me his address and told me to come out to the house.

Q Do you recall what his address was?

A Thirteen forty Michigan Avenue.

Q All right.

A I then drove out to the house, where I arrived at about eight o'clock.
Greene admitted me to the house. And there in the living room we had a conversa-
tion.

Q Do you recall what that conversation was that you had with Greene?

A Yes, I do.

Q What was that?

A I told Greene that McGuire had sent me up from North Carolina to
pick up an ounce of heroin.

Q "McGuire" meaning who?

A Agent Kelly, sir.

He asked me did I have the money. I said yes, and I reached in my
jacket and I pulled out \$600 of funds. He looked at the money and says "It
is all there." And I said "Yes." (90)

Greene then told me that it would take two or three days before
he could deliver the ounce of heroin; he had to get in touch with his people.
I said "Well, McGuire told me to give you the money and take the stuff right
back. I wasn't to wait."

He said "Well, there has to be a delay of two or three days."

I said "Is it all right if I call McGuire down in Greensboro?"

Greene says "Okay." So I got Agent Kelly on the phone and explained
to him what had happened. He then asked to speak to Greene. Agent Kelly and
Greene had a conversation. Then Greene hung up the phone, returned to the
living room, and he said he couldn't do business the way we wanted to do
business at that particular time; we would have to wait a few more days.

At about that time Barbara Floyd came into the house. And Greene
introduced me to her, and she sat down in the living room. I stayed a few
minutes more and had some small talk, and then I left.

Q And do you see that Greene in court here today who you saw on those
premises on December 23d?

A Yes, sir; I do.

Q And will you point at him, please. (90)

A He is the man sitting in the gray suit at counsel table. (91)

MR. MC LAUGHLIN. May the record show the witness identifies the defendant?

THE COURT. The record may so indicate.

MR. MC LAUGHLIN. That is all of this witness.

CROSS EXAMINATION

BY MR. LEVIN:

Q Mr. Jackson, on December 23d when you were with Mr. Greene did you see in his possession any narcotics?

A No, sir, I did not.

Q Did you see him give any narcotics to anyone?

A No, sir, I did not.

Q Did you see anyone give him any money?

A No, sir.

MR. LEVIN. No further questions.

MR. MC LAUGHLIN. I have nothing further with this witness.

THE COURT. You may step down.

(The witness William R. Jackson left the stand.)

WALTER STANLEY FIALKEWICZ, (92)

called as a witness by counsel for the United States and being first duly sworn, was examined and testified as follows:

DIRECT EXAMINATION

BY MR. MC LAUGHLIN:

Q Your full name is what?

A Walter Stanley Fialkewicz.

Q And how do you spell the last name?

A F-i-a-l-k-e-w-i-c-z.

Q And where do you live, Mr. Fialkewicz?

A Baltimore, Maryland.

Q And where are you employed?

A By the Federal Bureau of Narcotics, in Baltimore, Maryland.

Q And during the month of January of 1955 were you employed as an agent for the Federal Bureau of Narcotics?

A Yes.

Q And during the month of January of 1955 where were you assigned?

A I was assigned to the Washington -- I was assigned to the Baltimore

office on special assignment in Washington.

(92)

Q In Washington, D. C. here?

A That is correct.

Q Recalling your attention to January 14th of 1955, do you recall whether or not you were in Washington on that particular day?

(93)

A I do.

Q And on that particular day of January 14, 1955, do you recall whether or not you saw a person identified to you as Barbara Floyd?

A I did. I met Barbara Floyd in January --

Q And where did you meet Barbara Floyd?

A First and Constitution Avenue.

Q And that is in Washington, D. C.?

A That is correct.

Q And how did you get to that location?

A I drove to that location in a Government car.

THE COURT. What was the date?

MR. MC LAUGHLIN. January 14th, Your Honor.

THE COURT. Thank you.

BY MR. MC LAUGHLIN:

Q And you say you met her at First and Constitution Avenue, and at about what time?

A About five p.m.

Q And at that time did she get in the auto where you were?

A Yes, she got in the Government automobile.

Q And did you drive any place from that vicinity of Constitution Avenue and First?

A I drove about a half a block to get out of traffic, with her in the automobile, and stopped.

(94)

Q Did you have any conversation with her at that time?

A Yes, I had a conversation with her at that time.

Q With reference to narcotics?

A Yes, I did.

Q And as a result of that conversation, did you give her any moneys?

A Yes. At that time I gave her \$30.

Q And after giving her the \$30, did she remain there or did she leave your immediate location?

A After she received the money, she saw an automobile passing (94)
in the opposite direction and which she asked me to honk the horn at. I blew
the horn. The automobile pulled to the side. She left my car and entered this
other automobile and drove off.

Q And when did you next see Barbara Floyd on January 14th?

A It was a little before seven p.m. the same evening, at the Old
Ebbitt Grill, located in downtown Washington here.

(A container and two envelopes were
marked for identification as
Government Exhibits 1, 1-A and 1-B,
respectively.)

Q I will show you Government Exhibit marked for identification No. 1
and ask you whether or not you can identify that.

A I can.

Q And you identify Government Exhibit marked for identification No. (95)
1 as what?

A As the container with the 17 capsules of heroin that I received
from Barbara Floyd on January 14.

Q And where were you at the time you received Government Exhibit 1
from the co-defendant Barbara Floyd?

A I was in the Government car with Floyd, about at 10th, about 910
Tenth Street, Northeast.

Q And at the time you received the Government Exhibit No. 1, you say
it contained what?

A Seventeen capsules of heroin.

Q And at the time that the capsules were received by you, did the
container have any Government stamps of any kind on them?

A No mark or stamp at all.

Q No Government stamps of any kind?

A No.

Q After you received Government Exhibit marked for identification No.
1 from Miss Barbara Floyd, I will show you Government Exhibit 1-A and ask you
if you can identify that.

THE COURT. Where did he say he received this, Mr. McLaughlin?

BY MR. MC LAUGHLIN:

Q Where did you say you received Government Exhibit 1?

A About in the 900 block of Tenth Street, Northeast.

(96)

Q And that is in the District of Columbia?

A In the District of Columbia, yes, sir.

(96)

Q Showing you Government Exhibit marked for identification 1-A, I ask you if you can identify that.

A I can.

Q And you identify Government Exhibit marked for identification 1-A as what?

A As the Treasury Department lock-sealed evidence envelope in which I put Government Exhibit No. 1 into, sealed, and sent by registered mail to the United States Chemist.

Q And I will show you Government Exhibit marked for identification 1-B and ask you if you can identify that.

A Yes. This is the envelope, the registered mail envelope, I sent to the United States Chemist, which contained the evidence of the 17 capsules.

Q That is, contained Government Exhibit 1 and 1-A? Is that right?

A That is correct.

THE COURT. I think this will be a convenient time to give the jury its usual mid-afternoon respite.

(Following brief recess:)

BY MR. MC LAUGHLIN:

Q Going back, I believe you say, after inserting Government Exhibit 1-A, which contained Government Exhibit 1, into 1-B, you mailed it and sent it to whom? (97)

A To the United States Chemist here in the Internal Revenue Building, Washington, D. C.

Q Washington, D. C.?

A That is correct.

Q After January 14 of 1955 --

THE COURT. Before you leave this, in order that I may follow this, this goes to the second count of the indictment?

MR. MC LAUGHLIN. Yes, Your Honor, the sale and facilitating on January 14th.

BY MR. MC LAUGHLIN:

Q After January 14 of 1955, did there come a time when you saw Barbara Floyd again after that date?

A I did.

Q When was the next occasion you saw Barbara Floyd?

A On January 18.

Q And where did you see her at that time?

(97)

A I met her at 5:35 p.m. at First and Constitution Avenue here in Washington, D. C.

Q And at that time did you give her any moneys?

A Not at that time.

Q After you met her at that particular place, did you go any place with her?

A Yes. We went to different locations here in Washington and then (98) to her house, near her house, at 1308 Adams Street, Northeast, where she entered. And when she returned, she gave me four capsules of heroin and I gave her eight dollars.

MR. MC LAUGHLIN. Will you mark this Government Exhibit 2, 2-A and 2-B for identification,

(Three envelopes were marked for identification as Government Exhibits 2, 2-A and 2-B.)

BY MR. MC LAUGHLIN:

Q I will show you Government Exhibit marked for identification No 2 and ask if you can identify that.

A I can.

Q And you identify Government Exhibit marked for identification No. 2 as what?

A As the four capsules I received from Barbara Floyd on the 18th.

Q And at the time you received those four capsules, what did they contain?

A They contained a white powdery substance which according to field test contained a derivative of opium.

Q At the time you received those capsules containing a white powder from Barbara Floyd, did they have any Government stamps of any kind on them?

A They did not.

Q After receiving Government Exhibit marked for identification No. (99) 2, I will show you Government Exhibit 2-A and ask you if you can identify that.

A I can.

Q And you identify Government Exhibit marked for identification 2-A as what?

A As the Treasury Department, Bureau of Narcotics, lock-sealed evidence envelope.

Q Did you do anything with Government Exhibit 2 in reference to

A Yes. I put Government Exhibit 2 into 2-A, and then placed 2-A in another envelope and mailed it to the United States Chemist.

Q Is there any difference in Government Exhibit 2-A today than when you put Government Exhibit 2 into it?

A Yes. It has been, the end has been ripped open.

Q Was it sealed?

A It was sealed, locked and sealed, when I closed it.

Q I will show you Government Exhibit marked for identification 2-B and ask you whether or not you can identify that.

A Yes. This is the registered mail envelope that I placed 2-A in with 2 in it, and sent to the United States Chemist here in Washington, D. C. for further analysis.

Q After January the 18th of 1955, did there come a time when you saw the defendant again?

A Yes, I did.

(100)

Q And when was that?

A January 21st.

Q Now, on January the 21st, when you say you saw the defendant -- I will withdraw that question.

On January 21st did you see Barbara Floyd?

A Yes, I did.

Q And at that time on January the 21st did you give her any moneys?

A I gave Barbara Floyd \$100 of official advance Government funds, about 8:40 p.m. in the morning.

Q And was there anyone with you at the time that you gave Barbara Floyd the \$100?

A Agent Tremoglie.

Q And you say that was approximately what time?

A Near eight-thirty p.m. in the morning.

Q Did you see Barbara Floyd again that day, on January 21st, after you gave her the hundred dollars?

A Yes, I did.

Q And when did you see her?

A I saw her later that evening, at nine-thirty p.m.

Q And at that time who was with you?

A Agent Tremoglie was with me.

Q And did you at that time when you saw Barbara Floyd receive (100)
anything from her at that time?

A About nine-thirty that evening, at the Brentwood Village (101)
shopping center, in the parking area, here in Washington, D. C., Barbara
Floyd approached the Government car in which Agent Tremoglie and myself
were seated.

Q I will stop you right there. How did you go to the Brentwood Village
that night? How did you come to go there?

A We called Barbara Floyd's residence and received instructions to
meet her there.

Q To meet her there?

A That is correct.

Q And you say you arrived at that Brentwood Village about what time?

A We arrived there a little after nine, and waited until nine-thirty.

Q And that Brentwood Village is located where?

A Around 14th and -- I can't think -- I don't remember the main
thoroughfare there. It is 14th, Northeast.

Q If I mentioned it to you -- Rhode Island Avenue.

A Yes, Rhode Island Avenue.

Q And is it in the District of Columbia?

A In the District of Columbia.

Q When you arrived at that immediate vicinity, about nine or nine-
thirty that evening of January 21st, did you see Barbara Floyd?

A Yes; she entered our Government car. (102)

Q Did you see her prior to the time she entered the Government car?

A Approaching the car and then entering it.

Q When you say approaching the car, did you see how she arrived in
that immediate vicinity?

A No, I didn't see how she arrived.

Q And when she approached the car, from what direction did she approach
the car you were in?

A From the front. She came from one of the stores and entered the car
from the front.

Q And at that time did you receive anything from Barbara Floyd?

A I did not.

Q Did you talk to her at that time?

Q Yes, we did talk to her. Agent Tremoglie and myself talked to her.

Q And as a result of that conversation, how long did you stay (102)
there at that time talking to her?

A We stayed a few minutes talking to her. She handed to Agent Tremoglie a package, and she told Agent Tremoglie and myself that she would come back to the same location later that evening and we would get the remainder of the narcotics for the hundred dollars. In that package she gave Agent Tremoglie was 30 capsules of heroin.

Q And how did she leave that immediate vicinity? Do you recall? (103)

A Yes. She walked to the drugstore in that shopping area. And standing there was this man who she joined, and both went to a car parked alongside of the drugstore and drove from the area.

Q And what kind of a car was that? Do you recall?

A It was a 1954 Packard sedan.

Q And do you see the man here in the courtroom today who she contacted?

A Yes, I do.

Q And will you point at him, please.

A The man seated -- the second man at the counsel table.

MR. MC LAUGHLIN. May the record show the witness has pointed to the defendant Greene?

THE COURT. Let the record so show.

BY MR. MC LAUGHLIN:

Q After she left the immediate vicinity with the defendant Greene, did you see her --

At the time she left the immediate vicinity on January 21st with the defendant Greene, had you any arrangements with Miss Floyd as to where or when you were to meet her again?

A Yes. She told us to be at the same location in the parking lot (104)
at 11:30 that evening, the same evening.

Q And were you at that parking lot -- and when you say the same parking lot, that was located where?

A At the Brentwood Village shopping center.

Q And that is in the District of Columbia?

A That is correct.

Q At 11:30 that evening where were you?

A We were at that same location, in the village parking lot.

Q When you say "we," who was with you?

A Agent Tremoglie and myself.

(104)

Q And while you were at that location at about 11:30 on January 21st, did you see Barbara Floyd?

A Yes. She arrived at the parking lot in the same car, the 1954 Packard.

Q When you say "in the same car," what was that?

A The 1954 Packard sedan driven by William Greene.

Q At the time she arrived in this Brentwood parking lot about 11:30 that night, where were you?

A I was up on the pavement near the theater, and Agent Tremoglie was seated in the automobile, the Government automobile.

Q Did you, when you saw Barbara Floyd drive up in this 1954 Packard, did you remain in the position that you were in?

A No.

(105)

Q What did you do?

A I walked towards our automobile.

Q And when you walked towards your automobile, where was Barbara Floyd?

A Barbara Floyd was going to our automobile.

Q And at that time how far away from you was this Packard automobile she arrived in?

A I walked right by the automobile and walked to our car.

Q Walked by the --

A Yes, I walked within a few feet of it.

Q That is the 1954?

A Yes, sir.

Q And at that time was there anyone seated in the automobile?

A There was.

Q And where were they seated in the automobile?

A In the driving seat was William Greene.

Q And when you say "In the driving seat was William Greene," do you see William Greene in court here today?

A Yes, I do.

Q And where is he?

A He is seated at the counsel table, the same man.

MR. MC LAUGHLIN. May the record show he points to the defendant (106) Greene?

BY MR. MC LAUGHLIN:

Q At that time when you saw Barbara Floyd, did you receive anything from her at that time?

A No, we did not.

Q When you say "we," you mean yourself and Agent Tremoglie?

A That is correct.

Q Did you have any conversation with Miss Floyd at that time?

A Yes, we did.

Q And that was what?

A Miss Floyd at that time said that she and her man could not receive the narcotics in time, but would like to meet us at one o'clock at the Crescent Inn, located downtown on New York Avenue.

Q And then how long would you say she remained there in the Government car at that time?

A Only a few minutes.

Q Did there come a time when she left?

A She did.

Q And by what means did she leave the parking lot?

A She went back to the 1954 Packard, entered on the opposite side of the driver in the front seat, and they drove away from there.

(107)

Q And when you say "they," who drove that car away with Miss Floyd in there?

A William Greene drove the car.

Q That is about one-ten, which would be, I believe, January 22. Is that right?

A Yes, sir.

Q About one-ten or one-fifteen a.m. in the morning of January 22d, where were you?

A At the Crescent Inn in downtown Washington here.

Q And the Crescent Inn at that time was located where?

A At New York and I think it is 14th Street -- New York and 14th Street.

Q And whereabouts in that immediate vicinity did you remain?

A Well, we remained in the Crescent Inn, until I noticed the car drive by.

Q You noticed what car drive by?

A The 1954 Packard.

(107)

Q And was that the same 1954 Packard that you had previously seen in the Brentwood parking lot?

A That is correct.

Q And when you saw the 1954 Packard drive by, what did you do?

A Agent Tremoglie and I left the Crescent Inn and stood near the front entrance, waiting for the car to make a U turn and park on the opposite side of the street. Then Barbara Floyd -- (108)

Q Then you would be on New York Avenue? Is that right?

A On New York Avenue, facing west.

Q That would be facing north -- no, we won't go into that. You were facing the Longchamps? Is that correct?

A That is correct.

Q Then while you were in that position did there come a time when you saw Barbara Floyd?

A Yes.

Q And where did you see her and in what direction was she coming from?

A She got out of the automobile, or came from the direction of the automobile.

Q What automobile?

A The 1954 Packard sedan.

Q From the position where you were standing, could you see the individual driver in the automobile?

A Yes.

Q And who was driving the automobile at that time?

Q William Greene.

Q And is that the defendant in this case?

A The same person.

Q And when you saw Miss Floyd come out of the automobile, where did she go? (109)

A She walked to us.

Q And at the time she walked to you, did you have any conversation with her?

A Yes, we did.

Q And when you say "we," who do you mean?

A Agent Tremoglie and I spoke to Barbara Floyd.

Q And what conversation did you have with Barbara Floyd at that time?

A Again she stated that she and her man could not make any (109)
connection, meaning that she could not obtain the narcotics, and she wanted
me to call her at her residence to find out when I could meet her to receive
the narcotics.

Q At the time you were having this conversation with Miss Barbara
Floyd, did you see the defendant Greene?

A Yes. He was locking the automobile; and after he locked the
automobile, he proceeded across the street towards us. And he hesitated and
waited until Floyd walked from us, and then he joined her and walked on
New York Avenue, together.

Q What?

A He and Floyd walked together, away from us.

Q And is that the last you saw of them at that time?

A On the 22d.

Q After the 22d of January of 1955, did there come a time when (110)
you saw Miss Barbara Floyd again?

A Yes; I saw her on the 23d of January.

Q And where did you see her, that is, Miss Barbara Floyd, on January
23d, did you say?

A Yes, sir.

Q Where did you see her at that time?

A At her home at 1308 Adams Street.

Q And where is that?

A That is 1308 Adams Street, Northeast, Washington, D. C., apartment
3.

Q And what time did you say you saw her at that time?

A It was about 12:15 noon.

Q And at that time when you saw her on January the 23d of 1955, did
you receive anything from her?

A I received 37 capsules of heroin from her at that time, wrapped
in a piece of white towel paper.

(Three envelopes were marked for identifica-
tion as Government Exhibits 3, 3-A and
3-B.)

Q At the time on January 23d when you received the capsules, as you
referred to them, did you give her any order form issued by the Secretary of
the Treasury for the purpose of purchasing narcotics?

A I did not.

(110)

THE COURT. This goes to count 7? Is that right?

MR. MC LAUGHLIN. Seven, eight and nine, Your Honor.

THE COURT. How about count 8?

(111)

MR. MC LAUGHLIN. I am coming to that.

THE COURT. Very well.

MR. MC LAUGHLIN. This is the one transaction.

THE COURT. And also as to the preceding, as to counts 4 and 5, there is a missing link, is there not?

MR. MC LAUGHLIN. Four, five and six, yes. I thought that was just facilitating, but it isn't. I will come back to it, Your Honor.

THE COURT. Of course, you proceed in your own way.

MR. MC LAUGHLIN. Yes. I will come back to it.

BY MR. MC LAUGHLIN:

Q Showing you Government Exhibit marked for identification 3, I will ask you if you can identify this.

A Yes, I can.

Q And you identify Government Exhibit marked for identification 3 as what?

A These are the 30 capsules that were received on January 21st from Barbara Floyd. Floyd handed these capsules to Agent Tremoglie, and Agent Tremoglie and I prepared this envelope.

Q At the time that those capsules of January the 21st were received by Agent Tremoglie, was there any Government stamp of any kind on them?

A No; there were no Government stamps or marks on them.

Q And did you or Agent Tremoglie at that time give her any order form issued by the Secretary of the Treasury for the purpose of purchasing narcotics?

A No, we did not.

Q And after you received, that is, Agent Tremoglie in your presence received, Government Exhibit marked for identification No. 3, what did you do with it?

A We prepared and made a Markey reagent test of it.

Q I show you government Exhibit 3-A and ask you if you can identify that.

A Yes, sir. This is the Treasury Department, Bureau of Narcotics, lock-sealed evidence envelope. We put this exhibit --

Q Government Exhibit 3?

A Three, into 3-A, locked and sealed it, and sent it by registered mail

to the United States Chemist.

(112)

Q I show you Government Exhibit marked for identification 3-B and ask if you can identify that.

A Yes, sir. This is the envelope in which three --

Q Government Exhibit 3?

A Three and 3-A, were put into this envelope and sent to the United States Chemist by registered mail -- here in Washington, D. C.

Q That is, you dropped it into the mail box? Is that right?

A We gave it to the clerk, at the mail --

(113)

MR. LEVIN. I didn't hear that last. You gave it to whom?

THE WITNESS. The clerk, in the post office.

BY MR. MC LAUGHLIN:

Q I believe you said on January 23d you received what from Barbara Floyd?

A Received 37 capsules of heroin, wrapped in a piece of white paper towel.

Q And where were you at the time you received them?

A At her apartment at 1308 Adams Street, Northeast, Washington, D. C.

(Three envelopes were marked for identification as Government Exhibits 4, 4-A and 4-B.)

Q Showing you Government Exhibit marked for identification 4, I ask you if you can identify that.

A I can.

Q And you identify Government Exhibit marked for identification No. 4 as what?

A As the 37 capsules received on the 23d from Barbara Floyd.

Q And those capsules at that time contained what?

A A white powdery substance which proved to be --

Q At the time you received those 37 capsules containing a white substance, did you give Barbara Floyd any order form issued by the Secretary of the Treasury for the purpose of purchasing narcotics?

(114)

A No, I did not.

Q Did Agent Tremoglie give her any, in your presence?

A No, he did not.

Q And showing you Government Exhibit marked for identification No. 4, I will ask you whether or not there was any Government stamp on them of any kind

at the time they were received from Barbara Floyd.

(114)

A No, there were not.

Q After receiving Government Exhibit 4 from Barbara Floyd, I show you Government Exhibit 4-A and ask if you can identify that.

A Yes, I can. This is the Treasury Department, Bureau of Narcotics, lock-sealed envelope in which we placed Government Exhibit 4, locked and sealed it and mailed it to the United States Chemist here in Washington, D. C.

Q And showing you Government Exhibit 4-B, I will ask if you can identify that. That is the large envelope.

A Yes. This is the Chemist's envelope in which he received the evidence.

Q This is marked Government Exhibit 4-B, and I ask whether or not you can identify that.

A Yes, sir. This is the registered mail envelope in which I put 4 and 4-A and mailed it by registered mail to the United States Chemist here (115) in Washington, D. C.

Q After January the 23d of 1955, did you see the defendant, that is, see Barbara Floyd again after that date?

A Yes, I did.

Q And when and where did you see her after January 23d of 1955?

A I met her on January 29, 1955, at Webster and 14th Streets, at an intersection where Webster, South Dakota and 14th Streets come together in Northeast.

Q Was there anyone with you at the time you met her at 14th and Webster Street?

A Agents Pappas, Wilson and Morrison were in the immediate area at that time. But they were not in the car with me.

Q How, if you know, did Miss Barbara Floyd get in that immediate vicinity?

A I spoke with Barbara Floyd at eight o'clock that evening on the telephone, at her home.

Q And at that time were arrangements made to meet her?

A At that time she instructed me to call her at her friend's house in Washington, D. C. here, a half an hour later, and she would tell me where to meet her.

Q And at the time that she told you to call, did she give you any particular phone number?

A No. I called back at her house a half an hour later and I (115)
received a message from a woman there to call the number of Lawrence 6-6787.

Q And did you call that number?

A I did.

Q And did you talk to Barbara Floyd at that number?

A I did.

Q Do you know at this time, that is, as of today, who lives at that
address where that number was registered to?

A Yes, I do.

Q Who?

A William Greene, the defendant.

Q And that address is what?

A Thirteen forty Michigan Avenue, Northeast.

Q In the District of Columbia?

A In the District of Columbia.

Q And did you have any conversation with Miss Floyd at that time over
the telephone?

A Yes, I did. She told me at that time that I could buy some narcotics
from her that evening, and where I should meet her, which she designated
would be 14th and Webster, and that I should be there at 10 o'clock.

Q Now, in your conversation with Miss Floyd at that time, over the
telephone, could you tell whether or not she was talking to someone else in
her immediate presence?

A While speaking on the phone to Barbara Floyd, and when I would (117)
ask her a question about narcotics, she in turn would cup the phone halfway
off so I could hear her speaking with someone else who she addressed as "Bill."
And when I would ask her a question as to the narcotics and the amount, she
would address the same questions to this "Bill" at that phone.

Q As a result of the conversation that you had with Miss Floyd at that
time on January 29th of 1955, did you see Miss Floyd?

A Yes.

Q And where did you see her and at what time?

A About ten-ten the same evening. I was parked on 14th Street facing
north.

Q Fourteenth near where?

A Near Webster -- the intersection of Webster, South Dakota and 14th.

Q Was that in the District of Columbia?

A In the District of Columbia, Northeast.

(117)

A 1954 Packard sedan came from Webster and parked on 14th Street at that intersection facing Michigan Avenue. I immediately made a U turn and parked behind that automobile, got out of the car and walked to the passenger side of the car where Barbara Floyd was seated. I opened the door and Barbara Floyd got out.

Q At that time, when you say Barbara Floyd was seated in that car, (118) was there anyone seated in the car with her?

A The driver of the automobile.

Q And who was the driver of the automobile?

A William Greene.

Q And that is the defendant here today?

A The defendant, yes, sir.

Q At that particular time did you hear Barbara Floyd say anything to Greene?

A Yes. She was angrily speaking to Greene, and she got out of the car. She was talking to Greene at that time.

Q When you say she was talking, did she say, in that conversation, was it anything pertaining to narcotics?

A Yes. She said that Greene was putting her out in front. It is a term that they would use it when she was selling for Greene.

Q Just tell us what she said.

A In other words, she is having this conversation with Greene. She says "You are putting me out in front and I am doing your work for you."

Q How close were you to Greene's car at that time?

A I had my hand on the door. The door was open and she was standing up.

Q And did she get out of the car or remain in the car?

A She got out of the car.

Q And when she got out of the car, where did she go?

A She walked with me and entered my car.

(119)

Q And at the time she walked to your car, did you receive anything from her?

A No, I did not.

Q And what conversation, if any, did you have with her at that time?

A As she seated herself in my car, she told me to drive around the block. I pulled away from the curb, went down to Michigan Avenue, went up Michigan Avenue to 13th Street, and up 13th Street, and she told me to stop.

At that time I stopped and parked, and she spoke a short while, (119) saying that she had 20 capsules of heroin, which she gave me, and she told me to come back, she said, in about an hour, and she would have the remaining of the narcotics. She gave me the capsules and I in turn gave her \$80 of official advance Government funds.

Q And after you received the capsules, you say you gave her \$80 in moneys?

A That is right.

Q And then what happened to her?

A Well, I drove her back to the intersection of Webster and 14th. We parked, and she said she noted that the Packard was gone, and she said, "Well, he left me again."

She told me to wait a few minutes. We waited and had a short conversation. And then she told me to drive her down to Michigan and 14th. I drove her to the intersection of Michigan and 14th, where she got out of the automobile and walked to 1340 and entered -- 1340 Michigan Avenue -- and entered. (120)

Q Did you see her enter those premises at that time?

A Yes, I did.

(Two envelopes were marked for identification as Government Exhibits 5 and 5-A.)

Q I will show you Government Exhibit marked for identification No. 5 and ask you if you can identify that.

A Yes, I can.

Q And you identify Government Exhibit marked for identification No. 5 as what?

A As the 20 capsules received on the 29th, at 10:10 p.m., from Barbara Floyd.

Q And what did they contain, that is, from the naked eye?

A They contained a white powdery substance.

Q And at the time did you on, that is, on January 29 at the time you received Government Exhibit marked for identification No. 5 from Miss Barbara Floyd, did you give her any order form issued by the Secretary of the Treasury for the purpose of purchasing narcotics?

A No, I did not.

Q Were there any Government stamps of any kind on Government Exhibit 5 at the time you received it from Miss Floyd? (121)

A No, there were not.

(121)

Q And after you received Government Exhibit 5 from Miss Floyd, I will show you Government Exhibit 5-A and ask you whether or not you can identify that, and if so what did you do with it?

A This is the lock-sealed envelope which I placed Exhibit No. 5 into, initialed it, sealed it, and sent it by registered mail to the United States Chemist.

Q Andy by registered mail to the United States Chemist where?

A Here in Washington, D. C.

THE COURT. I think this might be a convenient time to suspend. You are ready to proceed to another transaction?

MR. MC LAUGHLIN. Yes, Your Honor.

WALTER STANLEY FIALKEWICZ

(124)

returned to the stand and was examined and testified further as follows:

DIPECT EXAMINATION

(Resumed)

BY MR. MC LAUGHLIN:

Q I believe yesterday we finished up talking about January the 29th. Is that right?

A That is correct.

THE COURT. I think you had, Mr. McLaughlin.

MR. MC LAUGHLIN. Yes, Your Honor

BY MR. MC LAUGHLIN:

Q Now, after January the 29th -- you related the transaction you had with Barbara Floyd -- did there come a time you saw her again after that date?

A Yes.

Q When was the next time you saw Barbara Floyd?

A That was on the 30th.

Q The 30th of what?

A The 30th of January, 1955.

Q And where and when did you see her on January 30th of 1955?

(125)

A It was about 12:10 a.m. in the morning, right after midnight.

Q Where?

A I saw her at Webster and 14th Street, right at the Webster and 14th Street and South Dakota intersection, right there.

Q And how did you come to see her at that particular location?

A Well, earlier in the evening, the evening of the 29th, after I

received the 20 capsules of heroin from her, and paid her \$80, she said (125)
later that evening she would deliver the remaining capsules for the \$80. A
few minutes before 12, I was talking to her on the phone. I called Lawrence
6-6787.

Q Do you know where that number is located?

A That was 1340 Michigan Avenue.

Q And that is the home of whom?

A William Greene, the defendant.

Well, I was speaking to her for about 10 or 15 minutes, and she
says "Here they come now." And she cupped the phone again, and she was speaking
to a "Bill." And she talked to me and she said "All right, the same place in
about ten minutes," meaning the Webster and 14th Street location. And she
hung up. I went to the car and drove up to that area.

Q And what time did you say you arrived in that immediate area? (126)

A It was about 12:10. I parked the car and waited a few minutes.

Q Where did you park your car?

A I parked the car on Webster and 14th.

THE COURT. When you say 12:10, do you mean p.m. or a.m.?

THE WITNESS. A.m., in the morning.

I parked the car, at 14th and Webster, facing South Dakota, more or
less. It comes at an angle there. And I noticed headlights approach from my
left, which was on Webster, and at about the middle of the block the car
stopped. And then I saw Barbara Floyd come from this car.

BY MR. MC LAUGHLIN:

Q What car did you see her come from?

A I couldn't tell the car at first, until he pulled away, and I noticed
it was the 1954 Packard sedan.

Q Were you able to identify the driver of that car?

A Not at that time I couldn't. I just saw the car.

Q When Barbara Floyd left the car, where did she go?

A She came right to my car, and entered my car and seated herself there.
And we talked for a few minutes. She told me to drive around the block, which
I did. And then I parked just beyond where 14th Street enters into South (127)
Dakota, on South Dakota. And at that time she handed me a package which
contained 33 capsules.

Q Containing what?

A Of a white powdery substance.

MR. MC LAUGHLIN. Will you mark this Government Exhibit 6 and (127)
6-A and 6-B.

(Three envelopes were marked for identification as Government Exhibits 6, 6-A and 6-B.)

BY MR. MC LAUGHLIN:

Q I will show you Government Exhibit marked for identification 6 and ask you if you can identify that.

A That is the --

Q Can you identify it?

A Yes.

Q You identify Government Exhibit marked for identification 6 as what?

A As the capsules I received on January 30th.

Q From whom?

A From Barbara Floyd.

Q Did you give her any order form issued by the Secretary of the Treasury for the purchase of narcotics?

A I did not.

Q Were there any Government stamps of any kind on it?

A No, there were not.

Q After you received Government Exhibit marked for identification (128) No. 6 from Miss Floyd, I will show you Government Exhibit marked 6-A and ask you if you can identify that.

A Yes, sir. This is the Treasury Department, Bureau of Narcotics, evidence envelope in which I took Government Exhibit 6 and placed it in here and locked it and sealed it.

Q And I will show you Government Exhibit marked for identification 6-B and ask you if you can identify that.

A This is the registered envelope which I placed Government Exhibit 6 and 6-A into and sent it by registered mail to the United States Chemist here in Washington, D. C.

Q Bringing you back to Government Exhibit 5 and 5-A, after you put Government Exhibit 5 in 5-A, what did you do with it?

A I used the same registered envelope.

Q That is Government Exhibit 6-B?

A That is 6-B here.

Q Yes.

A I used this same envelope in order to mail these both to the United States Chemist.

Q That is, Government Exhibit 5 --

(128)

A Five.

Q -- and Government Exhibit 6?

A Five and six.

Q And you mailed them to whom?

A The United States Chemist here in Washington, D. C.

Q After January 30th did there come a time when you saw or talked (129)
to the defendant, William Greene?

A Yes, there was.

Q And when did you either see William Greene or talk to William Greene
after January 30th of 1955?

A It was February 2d of 1955, about 12:15 in the morning. I called
Lawrence --

Q You say you called him by phone?

(130)

A I did. I called him by phone the morning of February 2, 1955. It was
a few minutes after --

Q What number did you call? Do you recall?

A Lawrence 6-6787.

Q Did you know at the time it was the telephone number of William
Greene?

A I did.

Q And did you talk to the defendant, William Greene, at that time?

Q At the time you talked to William Greene on the telephone, at that
time did you recognize his voice?

A Yes, I did.

Q And had you heard his voice, that is, had you talked to him in (131)
person?

A I had not talked to him in person.

Q I meant, after that telephone call, had you talked to him in person?

A After the telephone call, yes, I talked to him in person.

Q And the time you talked to him in person was how long after that
telephone call?

A Oh, it was about a half an hour later.

Q And how long, that is, that half an hour later when you saw the
defendant, how long did you talk to him?

A Well, we sat there and talked --

Q Just approximately.

A About 30 minutes.

(131)

Q After talking to him for that 30-minute period of time, would you say that that was the same person you talked to when you called him by phone?

A It was.

Q And you did recognize the voice as being that of the defendant, William Greene?

A It was.

Q What conversation did you have with William Greene on the telephone?

A I called the number and asked for Barbara Floyd. And the person who answered, Greene, said "Who is this?" And I said "This is Jimmie Lee." (132)

And he says "Jimmie who?" And I said "Jimmie Lee, the fellow who called there last week for Barbara Floyd and met her on South Dakota Avenue." He said "Oh yes; I was there."

I said "Well, I want to see Barbara and do some business." And he said "Who are you?"

I said "The fellow who met her on South Dakota Avenue."

He said "What kind of car do you drive?"

I said "A green Mercury."

He said "From Ohio?" And I said "Yes."

He said "Well, what do you want?"

I says "I want to pick up 30."

He said "Thirty capsules or \$30?"

I said "Thirty capsules."

He said "Well, I will take care of you."

I said "Is Barbara there?"

And he said "No. She delivered for me."

So he asked me where I was, and I told him what phone I was at. And he says "Well, I will call you back." I hung up.

He called back in about 10 minutes and he told me to meet him at the Hot Shoppe at the counter in a few minutes. up at 14th and Rhode Island Avenue, the Hot Shoppe up there in Northeast, in Washington, D. C. (133)

I drove up to 14th and Rhode Island Avenue, entered the Hot Shoppe and waited at the counter. Well, he was about 20 minutes in coming. He came in, seated himself alongside of me, and started talking casually and identifying myself.

Q What do you mean by that?

A He asked me, first he came up and said "When was the last time you saw Barbara?"

And I said "I haven't seen her in a few days."

(133)

So he started talking about Ohio, questioning me about Ohio and about conditions in Ohio, and how long it would have taken to drive down from Ohio, and from Ohio to New York, and so forth.

Then he said to me, he says, "You want to pick up 30?" And I says "Yes, I do."

And he says "Are you alone?" I says "No; my friend is with me in my car."

And he said "I don't want to meet him." And I said "He's alright. You can meet him."

He says "No. Well, will you go up to Eddie Leonard's sandwich shop and park in the parking lot up there." That is at Bladensburg Road and 17th Street. He gave me the directions of how to get there. He told me the directions of how to get there, from the 14th and Rhode Island Avenue location to the Bladensburg Road and 17th Street.

Q Who was with you at that time? Do you recall?

(134)

A I was in the Hot Shoppe myself, seated in the Hot Shoppe. Agent Tremoglie was seated in the car outside the Hot Shoppe, parked facing the window. And agents Wilson, Detective Wurms, Pappas and Abram were around the area..

Q What other conversation did you have with him at that time?

A Then he asked me for the money in advance, and I told him I wasn't going to advance the money, because I would have to wait too long. So he said "All right. I will be up there in a half hour, at Bladensburg and 17th Street, at Eddie Leonard's sandwich shop."

THE COURT. What was the address?

THE WITNESS. Bladensburg Road.

THE COURT. Bladensburg Road at 17th?

THE WITNESS. And 17th.

I left the coffee shop and drove up to Eddie Leonard's sandwich shop, parking lot, parked the car and waited a few minutes. The other agents were in the area. When it was about half an hour after I parked the car, the defendant Greene drove up into the lot, pulled up facing us, and he was in the car with another unidentified man. He saw us and nodded to me, backed out and went on. That is the last I saw of him that evening.

BY MR. MC LAUGHLIN:

Q All you have testified to about these transactions on January

(135)

the 14th, and the 18th, and the 21st, and 23d, and the 29th and 30th of (135)
January, 1955, did they all happen in the District of Columbia?

A They all happened in the District of Columbia.

Q And all these contacts you made with the defendant and Barbara
Floyd happened in the District of Columbia?

A They all happened in the District of Columbia.

MR. MC LAUGHLIN. I believe that is all I have of this witness,
Your Honor.

THE COURT. Is there any cross-examination?

CROSS EXAMINATION

BY MR. LEVIN:

Q At any time in your investigation of this case did you personally
ever see any narcotics in the possession of Mr. Greene?

A No, I did not.

Q At any time in the course of your investigation of this case did
you ever see anyone purchase -- by that I mean give money to William Greene
for narcotics?

A No, I did not.

Q You yesterday mentioned some particular type of money that you
received to use in this case. What did you call that money?

A It is advance funds that were issued. It is regular currency. (136)

Q Is it regular United States currency?

A That is correct.

Q Was this currency marked or the numbers taken down in such a manner
that you could identify it at a later date?

A Yes, it was.

Q You say you gave this money to Barbara Floyd?

A That is correct.

Q And you never gave any of this money to William Greene?

A No, I never did.

Q There came a time, did there not, when Mr. Greene was arrested? Is
that true?

A That is correct.

Q And he was searched at that time?

A That is correct.

Q When he was searched, were any narcotics discovered on his person?

A No, no narcotics were found on his person.

Q And was any of this marked currency found on his person? (136)

A No, no marked currency was found on his person.

Q And isn't it true you went to his home and searched his home?

A That is correct.

Q And nothing was found there in the nature of narcotics? (137)

A No.

Q And nothing was found there in the nature of marked money?

A No.

MR. LEVIN. I have no further questions.

REDIRECT EXAMINATION

BY MR. MC LAUGHLIN:

Q When was he arrested? Do you know?

A He was arrested February 9th.

Q Nineteen fifty-five?

A Nineteen fifty-five.

MR. MC LAUGHLIN. That is all I have of this witness, Your Honor.

THE COURT. You may step down.

(The witness Fialkewicz left the stand.)

MR. MC LAUGHLIN. Agent Tremoglie.

Thereupon

JOSEPH J. TREMOGLIE,

called as a witness by counsel for the United States and being first duly sworn, was examined and testified as follows:

DIRECT EXAMINATION

BY MR. MC LAUGHLIN:

Q Your full name is what?

A Joseph J. Tremoglie. (138)

Q And where are you employed?

A The Bureau of Narcotics.

Q As what?

A As a narcotic agent.

Q And what district are you assigned to?

A Chicago.

Q And during the month of January of 1955 where were you employed?

A New York City.

Q And were you assigned to the District of Columbia during the month of January of 1955?

A Yes, sir.

Q Working as a narcotic agent?

A Yes, sir.

Q Recalling your attention to January, I believe the 18th, of 1955, did you see Agent Fialkewicz on that date?

A Yes, sir.

Q And did there come a time when you saw a person identified to you as Barbara Floyd?

A Yes, sir.

Q And when and where did you see Barbara Floyd on January 18th of 1955?

A At First and Constitution Avenue.

Q And what happened when you saw her at First and Constitution Avenue? (139)

A Well, we had a conversation and we made arrangements to go out to dinner that night.

Q And did there come a time when any narcotics were purchased from her at that time?

A Yes, sir; that evening.

Q And approximately what time was that?

A At about 8:15 that evening.

Q And that purchase was made by whom?

A By Agent Fialkewicz.

Q And was that purchase made by the agent, Fialkewicz, in your presence?

A Yes, sir.

Q And did you see Agent Fialkewicz give any moneys to Barbara Floyd?

A Yes, sir. He gave her \$8.

Q And what did Barbara Floyd give him in return?

A She gave him four capsules of heroin.

Q On January the 21st of 1955 did you see Agent Fialkewicz?

A Yes, sir.

Q And when did you see Agent Fialkewicz on January 21st of 1955?

A I saw him in the District office.

Q And after seeing Agent Fialkewicz at the District office, did you go any place with him? (140)

A Yes, sir. We went to the vicinity of 1300 Downing Street.

Q And did there come a time when you saw Barbara Floyd that evening?

A Yes, sir. We met Barbara Floyd at 1300 Downing Street, in the (140)
vicinity of 1300 Downing Street.

Q And after meeting Barbara Floyd, did you go any place with her?

A Yes, sir. Floyd and Agent Fialkewicz and myself, in the Government
car, we went to the vicinity of 1300 Michigan.

Q And when you went to that vicinity, what happened to Barbara Floyd?

A Agent Fialkewicz gave Barbara Floyd a hundred dollars of official
advance funds, to purchase narcotics.

Q When you say a hundred dollars of official advance funds, that is
money given to the agents by whom?

A By the agent in charge of the District office for the purposes of
obtaining evidence.

Q It is Government money? Is that it?

A Yes, it is Government money.

Q And after Agent Fialkewicz gave Miss Floyd the hundred dollars,
where did Miss Floyd go or what did she do?

A Miss Floyd departed from our company and walked in the rear of (141)
Michigan Avenue, that is, the alley way, and walked toward the house which was
located at 1340 Michigan.

Q And after that did there come a time when you saw her again?

A Yes, sir. In about 10 minutes she returned to the car.

Q And when she returned to the car, where did you go?

A We took her to First and Constitution Avenue.

Q And what happened at First and Constitution Avenue?

A She told us to contact her by phone by 11:30 that morning, and she
would be able to tell us when to deliver the narcotics.

Q Did you personally contact her in the morning?

A No, sir; Agent Fialkewicz did.

Q Did there come a time when you saw Miss Floyd on that date?

A Yes, sir, at about nine-thirty p.m.

Q In the evening?

A Yes, sir.

Q And where did you see her at that time?

A Agent Fialkewicz and myself were parked in the parking area of the
Brentwood Village shopping center.

Q And do you know where that is located here in Washington?

A My best recollection is it is at Rhode Island Avenue and Brentwood.

Q And what time did you say that you and Agent Fialkewicz parked (142)
at the Brentwood Village parking lot?

A We were there from about 8:45 that evening.

Q And after you arrived there, did there come a time when you saw
Barbara Floyd?

A Yes, sir, at about nine-thirty.

Q And just tell us under what circumstances or conditions you saw
Barbara Floyd.

A Agent Fialkewicz and I observed a blue Packard pull up on, I believe
it was Rhode Island Avenue, alongside the drugstore, and Barbara Floyd came
out of that car. And we got her attention and she walked over to where we
had the Government car parked. And she spoke with us concerning narcotics.

Q How far was this Packard parked away from where you were?

A If I am to put it in the measure of blocks, it was approximately
half a block away.

Q And Barbara Floyd did what?

A And Barbara Floyd came to the Government car and handed me a Kleenex
tissue in which was wrapped 30 capsules of heroin.

Q I will show you Government Exhibit marked for identification No. 4
and ask you if you can identify that.

A Yes, sir. This is the package that I received. (143)

Q And what did it contain at the time that you received it from Miss
Floyd?

A Approximately 30 capsules of heroin.

Q Did it have any Government stamps on there of any kind?

A No, sir.

Q Did you at any time give her any order form issued by the Secretary
of the Treasury for the purpose of purchasing narcotics?

A No, sir.

Q After you received Government Exhibit 4, the capsules from Miss
Floyd, where did she go or what did she do?

A She returned to the spot where the blue Packard was parked, and
she got into the car and away she rode with the driver, that is.

Q Were you able to identify the driver of that car?

A I saw the driver of the car enter the drugstore, as Barbara walked
over to where we were. When we got her attention, and after she was in the car,
we observed the driver of that car walk into the drugstore.

When Barbara left the car to return to the Packard, she walked (143) into the drugstore, and together we observed her walking out with the person who was driving the car.

Q And do you see the person who was driving the car in court here (144) today?

A Yes, sir.

Q Will you point at him, please.

A That is the gentleman sitting between the two defense counsel.

Q What color ties has he got?

A He has got a striped tie on.

MR. MC LAUGHLIN. May the record show he identified William Greene?

THE COURT. The record may so show.

BY MR. MC LAUGHLIN:

Q Were you with Agent Fialkewicz during the month of February, 1955?

A Yes, sir.

Q And did there come a time when you saw the defendant William Greene while you were with Agent Fialkewicz in February?

A Yes, sir.

Q Can you recall the approximate date?

A I believe it was the 2d of February.

Q Tell us under what circumstances you saw the defendant on February 2d of 1955.

A I saw the defendant Greene speaking with Agent Fialkewicz at the counter of the Hot Shoppe located up in that area at Rhode Island and Brentwood.

Q And at the time he was talking with Fialkewicz, where were you? (145)

A I was right outside the door, observing everything I could through the window.

Q And did you see the defendant arrive at that location?

A Yes, sir.

Q And how did he, by what means of transportation did he get to that immediate vicinity?

A My best recollection is he had that blue Packard with the D. C. license plate, D-5347, I think.

MR. MC LAUGHLIN. I believe that is all I have of this witness.

CROSS EXAMINATION

BY MR. LEVIN:

Q In the course of your investigation of this case, did you personally ever see any narcotics in the possession of Mr. Greene? (145)

A No, sir.

Q Did you ever see Mr. Greene receive any money from anyone for narcotics?

A No, sir.

Q You mentioned Government currency that was issued to you to be used in this case.

A Yes, sir.

Q Was that currency identifiable? (146)

A Yes, sir.

Q By that I mean it was marked in some fashion?

A Yes, sir.

Q At any time after the arrest of Mr. Greene, was any of that marked currency found on Mr. Greene?

A I had no knowledge of it, sir, because I never checked the money.

Q After his arrest, were any narcotics found upon him?

A I don't know, sir. I wasn't the arresting officer.

Q Were you aware of the fact that Mr. Greene's house was searched after his arrest?

A No, sir; I wasn't there at the search.

MR. LEVIN. Nor further questions.

THE COURT. You may step down.

MR. MC LAUGHLIN. May this witness be excused permanently, Your Honor?

THE COURT. The witness may be excused.

MR. MC LAUGHLIN. He has to go back to Chicago.

(The witness Tremoglie accordingly excused.)

MR. MC LAUGHLIN. Agent Wilson.

Thereupon

FRED EARL WILSON,

called as a witness by counsel for the United States and being first duly sworn, was examined and testified as follows:

BY MR. LEVIN:

Q Agent Wilson, in your investigation of this case did you ever personally see any narcotics in the possession of Mr. Greene?

A No, sir.

Q Did you ever personally see anyone give Mr. Greene any money for the purchase of narcotics?

A No, sir.

Q You are aware of the fact that in this case marked Government money was used?

A No, sir; I am not.

Q You are not aware of that fact?

A No, sir.

MR. LEVIN. I have no further questions, Your Honor.

(154)

THE COURT. You may step down.

(The witness Wilson left the stand.)

MR. MC LAUGHLIN. Agent Gannon.

Thereupon

JOHN JOSEPH GANNON,

called as a witness by counsel for the United States and being first duly sworn, was examined and testified as follows:

CROSS EXAMINATION

(156)

BY MR. LEVIN:

Q At any time in the investigation of this case did you personally ever see any narcotics in the possession of Mr. Greene?

THE COURT. Just a moment. I am going to exclude that as not proper cross-examination. That is outside the scope of the direct examination. (157)
This witness didn't testify anything about the defendant.

MR. LEVIN. You are very right, Your Honor. Excuse me for having asked the question.

THE COURT. You may step down.

(The witness Gannon left the stand.)

MR. MC LAUGHLIN. Call Agent Pappas.

Thereupon

FRANK G. PAPPAS,

called as a witness by counsel for the United States and being first duly sworn, was examined and testified as follows:

BY MR. MC LAUGHLIN

Q Your full name is what?

A Frank G. Pappas.

Q And where are you employed, Mr. Pappas?

A The Federal Bureau of Narcotics, Washington field office, United States Treasury Department.

Q As what?

A As a federal narcotic agent.

Q And were you so employed during the month of January, 1955?

A Yes, sir; I was.

Q Recalling your attention to January 18 of 1955, did you see a person who was later identified to you as Barbara Floyd? (158)

A On January 18th, no, sir.

Q On January the 29th did you see her?

A Yes, sir.

Q Tell us under what circumstances you saw the individual named Barbara Floyd on January the 29th of 1955?

A Well, on January the 29th, 1955, I was parked together with Agent Wilson on 14th Street between Varnum and Webster Streets, Northeast, at which time a 1954 blue Packard had pulled around the corner from Webster and had parked on 14th Street facing south, facing me.

At that time I observed Agent Fialkewicz make a U turn in the intersection and pull up behind the car. A few moments thereafter Agent Fialkewicz got out of the car from the driver's side, walked in front of his car and to the other side of the Packard as it was parked next to the curb.

A few moments thereafter I noticed Fialkewicz return and get back into the car again. He then drove the car away and came south on 14th Street and down to 14th and Michigan Avenue. At that time he disappeared from view.

Then the blue Packard started up and left the curb and proceeded south on 14th Street to Michigan Avenue, at which time the car was placed in reverse and then backed up into Varnum, which is a very, very short intersection there, and parked in the 1300 block of Varnum Street, Northeast.

Agent Fialkewicz then was observed to re-park in the same place at 14th and Webster. About ten-thirty Agent Fialkewicz pulled away from the curb and drove down to 14th and Varnum, at which time I observed the girl, Barbara Floyd, leave the automobile and start walking east on Varnum. (159)

Q Leave what automobile?

(159)

A Leave Agent Fialkewicz's automobile.

Q And where did she go after she left Agent Fialkewicz's automobile?

A She walked east on Varnum and went into an alley, and at that time she disappeared from my view. And Agent Wilson had left my presence at that time.

Q And in the direction of what street?

A Well, she was walking from 14th toward 13th.

Q Did you see her any more that night?

A Yes, sir.

Q When did you see her again after that?

A Well, it was about 12:15 the following morning. And I saw her get into the car.

Q Into what car?

A Into Greene's car. And she went up to Webster Street, between 13th and 14th, and she left Greene's car and walked into Fialkewicz's car.

Q And then what happened?

A Then Agent Fialkewicz left the area and I discontinued surveillance at that time.

(160)

Q You didn't see them any more after that? I mean on that particular date.

A No. The car drove around and left Webster Street, and it was re-parked in Varnum Street again and he left the car. And that is the last I saw of him.

Q On January 30th, did you have an occasion to see Barbara Floyd?

A Yes. I saw her at that time get into Agent Fialkewicz's car. That is correct.

Q Where did she get into Agent Fialkewicz's car?

A At the intersection of 14th and Webster.

Q And how long did she remain in his car?

A She didn't remain in his car very long at that time. They drove away after --

THE COURT. Keep your voice up.

THE WITNESS. After she got into the car, she didn't remain there very long. The car drove away.

BY MR. MC LAUGHLIN:

Q What car drove away?

A Agent Fialkewicz's car drove away. (160)

Q With Barbara Floyd in it?

A Yes, sir; she was.

Q Did you see her any more after that?

A No, I did not.

CROSS EXAMINATION

(161)

BY MR. LEVIN:

Q Agent Pappas, in your investigation of this case at any time did you see any narcotics in the possession of Mr. Greene?

A No, sir; I did not.

Q At any time in the course of your investigation did you see anyone give Mr. Greene cash for narcotics?

A No, sir; I did not.

Q Are you aware of the fact that marked Government money was used in this case, sir?

A I believe it was, yes, sir.

Q Are you aware of the fact?

A I think to the best of my recollection I believe at some time or other it was. I don't know exactly what instances there was; but I believe there was.

Q Within your knowledge, was any of this marked currency found in the possession of Mr. Greene?

A That I don't know.

Q Are you aware of the fact that Mr. Greene's house was searched after his arrest?

A Yes, I am.

Q And at that time isn't it a fact that no narcotics were found in the house?

A I wasn't there. I don't know. I wasn't present at the time of the search. (162)

MR. LEVIN. No further questions.

MR. MC LAUGHLIN. That is all I have of this witness.

THE COURT. You may step down.

(The witness Pappas left the stand.)

MR. MC LAUGHLIN. Call Dr. Young.

Thereupon

DR. JAMES L. YOUNG

DIRECT EXAMINATION

MR. LEVIN. The Government having closed its case, at this time (170)
I move for judgment of acquittal.

THE COURT. Motion denied.

MR. LEVIN. May I argue it?

THE COURT. Very briefly.

MR. LEVIN. I intended to take up each one of the counts.

THE COURT. Oh no. Motion denied. If you will tell me what your point is.

MR. LEVIN. There are several counts here on which quite obviously there was no evidence, and that is the question of having possession of narcotics with knowledge they had been illegally imported into the United States.

THE COURT. Well, of course, that statute provides for a presumption, you know.

MR. LEVIN. That presumption would rest upon the heroin, or whatever narcotic happens to be, being in the physical possession of the defendant. It was never shown here.

THE COURT. The witness Floyd testified that it was. Don't overlook that the witness Floyd was the complete witness here. (171)

I am going to deny the motion. It was proper for you to make it for the record, and I deny it.

MR. LEVIN. At this time the defendant rests his case.

MR. LEVIN. And I wish to offer one prayer, Your Honor (handing). (172)
And in addition to that the general instruction about competency.

THE COURT. Denied. The Fletcher case doesn't say that a drug addict is inherently a perjurer. I am not going to brand any witness as inherently a perjurer. In the light of your request, I am going to state to the jury that they have a right, in weighing the credibility of Barbara Floyd, to consider the fact that she was a drug addict at the time. You are entitled to that, but not to the statement that she is inherently a perjurer.

MR. LEVIN. And I think Your Honor will give the instruction that an accomplice is to be viewed, and so on.

THE COURT. I don't give it unless it is asked for.

MR. LEVIN. I shall request it. (173)

THE COURT. I will grant that.

I will follow the Fletcher case; but, as I say, I won't use your language. Of course, if I thought she was a perjurer, I would have a right to

say that, because that would be a comment on the evidence. But I have (173)
never commented that way in any case, as to either a Government witness or a
defense witness. If you had a witness and I said that witness was a perjurer,
you would feel highly aggrieved, and justly so.

(At the conclusion of this opening argument to the jury by (175-195
Mr. McLaughlin, the following proceedings were had:)

THE COURT. Before you proceed, I would like to see counsel at the
bench.

(At the bench:)

THE COURT. I have just reexamined the Fletcher case. The Fletcher
case involved an informer who was also an addict, and Judge Groner, who was
a great judge, indicated that because of that peculiar situation there should
be such a caution given.

Here the witness Floyd was not an informer. However, she was an
accomplice, and I am going to give the accomplice instruction, of course. So
much for that.

* * * *

JUDGE'S CHARGE TO THE JURY

(220)

THE COURT. Ladies and gentlemen of the jury, the defendant, William
C. Greene, is on trial before this Court on charges of a number of violations
of the laws relating to narcotic drugs. It now becomes your duty to determine
whether he is guilty or not guilty of the charges on which he is being tried.

The indictment in this case names two defendants, Barbara E. Floyd
and William C. Greene. The case of the defendant Barbara Floyd is not now
before you; it is not now before the Court. The only case that is now before
the Court is that of the codefendant William C. Greene, and your verdict will
be directed only as to him.

The indictment consists of 15 counts and you will bring in a separate
verdict on each of the 15 counts. The indictment is a little longer and may at
first blush seem somewhat more complicated than most of the indictments with
which you have been concerned during the past month. However, on analysis
the issues for you to determine can be greatly simplified and it will by my
endeavor in the course of my remarks to simplify the issues for you to the
utmost.

Before I take up the discussion of the issues, there are some (221)
preliminary remarks that I want to make concerning some general matters which
those of you who have sat in this court during the past month have heard me

refer to time and time again. But some of you have not been in this court (221) until this case, and those of you of course have not heard me discuss these matters. In any event it is my duty to bring them to the attention of the jury in every case, and at the risk of wearying those who have heard me make them before I shall reiterate them now.

As you all understand, I am sure, the function of the Court and the duty of the Court is to instruct the jury concerning the rules of law applicable to the case. The jury is bound and obligated to take the law from the Court and to follow the Court's instructions as to the law. You, ladies and gentlemen, however, are the sole judges of the facts and you must determine the facts yourselves on the basis of the evidence introduced at this trial.

The Court has an additional function in connection with its instructions to the jury. It is a function of the Court to discuss the facts and the evidence, by summarizing the evidence and commenting on it, if the Court considers it is desirable to do so. The Court does this, however, merely in order to aid and assist the jury in arriving at its conclusions. The Court's discussion of the evidence is not binding on you; it is (222) intended only to help you. If your recollection or your understanding of the evidence should in any way differ from the Court's recollection or the Court's understanding, then it is your recollection and your understanding that must prevail, because the final decision on the facts is solely within your domain. My instructions are binding on you only as to the law.

Now I am going to refer to a few general principles that are applicable to all criminal cases, including of course this one:

First, the fact that a defendant has been indicted and is charged with a crime is not an indication of guilt, because the indictment is merely the procedure and the machinery by which a defendant is brought before the court and is placed on trial.

Second, every defendant in a criminal case is presumed to be innocent, and this presumption attaches to him throughout the trial.

Third, the burden of proof is on the Government to prove the defendant's guilt beyond a reasonable doubt. Unless the Government sustains this burden and proves beyond a reasonable doubt that the defendant has committed every element of the offense with which he is charged, the jury must find him not guilty.

Now, let me repeat, the burden of proof on the Government is to (223)

prove the defendant's guilt beyond a reasonable doubt. What is proof (223)
beyond a reasonable doubt? It does not mean proof beyond all doubt whatsoever.
It means proof to a moral certainty, and not necessarily proof to an absolute
or mathematical certainty. By a reasonable doubt, as its very name implies,
it meant a doubt based on reason, a doubt for which you can give a reason
to yourself, and not just some whimsical speculation or some capricious con-
jecture.

I am going to repeat an explanation of what is meant by proof beyond
a reasonable doubt which some of you have heard me give before. It is in
simple, everyday phraseology, which is both accurate and easily understood.
Proof beyond a reasonable doubt simply means this: If after an impartial
comparison and consideration of all the evidence you can say to yourself that
you are not satisfied of the defendant's guilt, then you have a reasonable
doubt. But, on the other hand, if after such impartial comparison and con-
sideration of all the evidence you can candidly and truthfully say to your-
self that you have an abiding conviction of the defendant's guilt, such as
you would be willing to act upon in the more weighty and important matters
relating to your own affairs, then you have no reasonable doubt. In other
words, proof beyond a reasonable doubt is such proof as will result in an
abiding conviction of the defendant's guilt on your part, such a convic- (224)
tion as you would be willing to act upon in the more weighty and important
matters relating to your own affairs.

In determining whether the Government has established the charges
against the defendant, you will consider and weigh the testimony of all the
witnesses who have testified before you, as well as all the circumstances
concerning which testimony has been introduced, because circumstances
frequently cast an illuminating light on oral testimony.

You are the sole judges of the credibility of witnesses. In other
words, it is for you and for you alone to determine whether to believe any
witness and the extent to which any witness should be credited.

You have observed that the defendant in this case has not taken
the witness stand and has not testified. Under our law a defendant in a
criminal case has the privilege and the right to take the witness stand and
give testimony. He also has the privilege and the right not to do so. It is the
defendant's option whether or not he should take the witness stand and testify.
He is under no obligation to testify if he chooses not to do so. The law is
that the jury must not draw any unfavorable or adverse inference against the

from the fact that he failed to take the witness stand and give testimony. (224)

The witnesses in this case are, first, the codefendant, Barbara Floyd, and, second, a number of Government narcotic agents. The witness Barbara Floyd, on her own testimony, is what is known in the law as an accomplice. The law requires me to state to you that the testimony of an accomplice should be received with care and scrutinized with caution. That does not mean that you should not believe an accomplice's testimony. All it means is that first you receive it with care and scrutinize it with caution; and if after having done so you decide to believe it, you have a right to act upon it. The degree of credibility which should be given to such testimony is a matter exclusively within the province of the jury, and you have a right, if you choose to do so, to accept the testimony of an accomplice. In fact, under our law, the jury has the right to convict a person on the sole, uncorroborated testimony of an accomplice, if the jury believes the accomplice. Here, however, you are not asked to do so, because the Government has introduced corroborating testimony from a number of Government agents. But under the law an accomplice in the commission of a crime is a competent witness.

This brings me to a more detailed and intensive consideration of the specific charges involved in this case. The first count in the indictment is rather long and may appear somewhat formidable at first blush; but (226) there is nothing mysterious to it when you analyze it. The first count charges conspiracy between Barbara Floyd and the defendant William C. Greene, a conspiracy to violate the narcotic laws. The statute relating to conspiracy reads as follows:

If two or more persons conspire either to commit any offense against the United States or to defraud the United States, in any manner or for any purpose, and one or more of such persons does any act to effect the object of the conspiracy, each shall be punished by the penalty which the statute prescribes.

Let me explain this and paraphrase this in simple, non-technical phraseology. A conspiracy is a combination of two or more persons to accomplish a criminal purpose by concerted or joint action. In other words, a conspiracy is a partnership in crime. A conspiracy is created by an agreement to commit a crime. It is not necessary, however, to show that the persons charged with conspiracy met together and entered into a formal agreement. Generally that is not possible, because ordinarily the very essence of a criminal conspiracy is that it is entered into in secret. It is sufficient to show, in proving a

prove the defendant's guilt beyond a reasonable doubt. What is proof (223)
beyond a reasonable doubt? It does not mean proof beyond all doubt whatsoever.
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or mathematical certainty. By a reasonable doubt, as its very name implies,
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you would be willing to act upon in the more weighty and important matters
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give testimony. He also has the privilege and the right not to do so. It is the
defendant's option whether or not he should take the witness stand and testify.
He is under no obligation to testify if he chooses not to do so. The law is
that the jury must not draw any unfavorable or adverse inference against the

from the fact that he failed to take the witness stand and give testimony. (224)

The witnesses in this case are, first, the codefendant, Barbara Floyd, and, second, a number of Government narcotic agents. The witness Barbara Floyd, on her own testimony, is what is known in the law as an accomplice. The law requires me to state to you that the testimony of an accomplice should be received with care and scrutinized with caution. That does not mean that you should not believe an accomplice's testimony. All it means is that first you receive it with care and scrutinize it with caution; and if after having done so you decide to believe it, you have a right to act upon it. The degree of credibility which should be given to such testimony is a matter exclusively within the province of the jury, and you have a right, if you choose to do so, to accept the testimony of an accomplice. In fact, under our law, the jury has the right to convict a person on the sole, uncorroborated testimony of an accomplice, if the jury believes the accomplice. Here, however, you are not asked to do so, because the Government has introduced corroborating testimony from a number of Government agents. But under the law an accomplice in the commission of a crime is a competent witness.

This brings me to a more detailed and intensive consideration of the specific charges involved in this case. The first count in the indictment is rather long and may appear somewhat formidable at first blush; but (226) there is nothing mysterious to it when you analyze it. The first count charges conspiracy between Barbara Floyd and the defendant William C. Greene, a conspiracy to violate the narcotic laws. The statute relating to conspiracy reads as follows:

If two or more persons conspire either to commit any offense against the United States or to defraud the United States, in any manner or for any purpose, and one or more of such persons does any act to effect the object of the conspiracy, each shall be punished by the penalty which the statute prescribes.

Let me explain this and paraphrase this in simple, non-technical phraseology. A conspiracy is a combination of two or more persons to accomplish a criminal purpose by concerted or joint action. In other words, a conspiracy is a partnership in crime. A conspiracy is created by an agreement to commit a crime. It is not necessary, however, to show that the persons charged with conspiracy met together and entered into a formal agreement. Generally that is not possible, because ordinarily the very essence of a criminal conspiracy is that it is entered into in secret. It is sufficient to show, in proving a

conspiracy, that the alleged conspirators tacitly came to a mutual understanding to accomplish an unlawful design. Such an understanding need not be shown directly because, as I said a moment ago, ordinarily a criminal conspiracy is characterized by secrecy. The agreement may be inferred from circumstances, such as the conduct of the parties and the acts done by the accused persons. Such an agreement may be inferred from the fact that two or more persons are acting together in an endeavor to accomplish the unlawful result. (226) (227)

A conspiracy to commit a crime is an offense separate and distinct from the crime itself. In order to justify a conviction on a charge of conspiracy, two elements must be established:

First, that a conspiracy was created or existed in the manner I have just indicated.

Second, that one or more conspirators did some act to effect the object of the conspiracy, that is, that one or more of the conspirators took some step in the direction of accomplishing the aim of the conspiracy.

Such an act is known as an overt act. The overt act need not be a criminal act. It may be an innocent act, standing by itself; but if it has a tendency to accomplish the purpose of the conspiracy, it is sufficient as an overt act.

It is sufficient for the Government to prove just one overt act, even though a number of overt acts may be alleged in the indictment. (228)

In count one of the indictment there are 22 overt acts alleged. But all that the Government has to prove and all that you need find is that any one of those overt acts has been committed; and if you also find that a conspiracy existed, under the evidence in this case, you have a right to find the defendant guilty on the first count of the indictment.

The other 14 counts relate to what in the law are known as substantive offenses. That is, they are specific transactions that violate the narcotic laws.

Before I come to analyze these counts, I want to say one word more about conspiracy. A conspiracy may be established by circumstantial evidence. The common design is the essence of the crime, which may be established by deduction from the facts. This may be made to appear when the parties steadily pursue the same object, whether acting separately or together, by common or different means, but ever leading to the same unlawful result. If the parties acted together to accomplish something unlawful, a conspiracy is shown and

may be inferred even though different conspirators may have done acts in (228)
furtherance of the common unlawful design apart from others.

Now I am going to take up the 14 counts charging specific violations
of the narcotic laws.

Narcotics have a recognized, legitimate use in medicine, and of (229)
course that use must not be interfered with. On the other hand, the use of
narcotics when not under the legitimate supervision of a physician is regarded
as dangerous and susceptible of an evil and insidious influence. For this
reason traffic in narcotics is regulated by law, in order that narcotics may
be obtainable for medicinal purposes under the supervision of a physician,
but at the same time in order that they may not be obtainable for illicit
and illegitimate uses. Accordingly, sale and purchase of narcotic drugs are
permitted only through certain legitimate, recognized channels and only in
certain legitimate ways, under proper governmental supervision. All traffic
in narcotics outside of the channels prescribed by law, as I have just
indicated, is illicit and is criminal, because of its detrimental effect on
the community.

The law relating to narcotic drugs applies to opium, cocoa leaves,
opiates, and any compound, salt, derivative or preparation thereof. The particu-
lar narcotic drug involved in this case is heroin. The Government chemist
testified that heroin is a derivative of opium. Consequently the law relating
to narcotics applies to heroin.

Now the second count relates to a transaction alleged to have taken
place on or about January 14, 1955. The charge is that the defendant facilitated
the concealment and sale of a narcotic drug, that is, 17 capsules containing
a mixture of heroin hydrochloride and other chemicals, after the said (230)
heroin hydrochloride had been imported into the United States contrary to law.

The statute governing the second count reads as follows:

Whoever fraudulently or knowingly imports or brings any narcotic
drug into the United States contrary to law, or receives, conceals,
buys, sells or in any manner facilitates the transportation, concealment
or sale of any such narcotic drug, after being imported or brought in,
knowing the same to have been imported contrary to law, or conspires to
commit any such act in violation of the laws of the United States, shall
be punished by the penalty prescribed by the statute.

In other words, the violation consists in facilitating the conceal-
ment and sale of a narcotic drug which had been imported into the United States

contrary to law, the defendant knowing that it has been so imported. (230)

The basis of this statute, ladies and gentlemen, is that it is a matter of common knowledge that narcotic drugs are not grown in the United States. The narcotic drugs that are available here are imported from certain foreign countries, and this statute punishes anyone who facilitates the transportation and concealment or sale of any imported narcotic drug, (231) knowing it to be imported contrary to law. And the law proceeds further and provides that the Government does not have to prove every element of the offenses enumerated in the statute, but all that the Government has to show is that the defendant had possession of the narcotic drug. The law further provides that such possession shall be deemed sufficient evidence to authorize conviction, unless the defendant explains his possession of the drug to the satisfaction of the jury.

In other words, if you find that the defendant had possession of this narcotic drug, in the District of Columbia, then from that fact alone you are at liberty to find the defendant guilty of a violation of the statute, without anything more, unless the defendant either by himself or by some other witnesses explains the possession of the drug to your satisfaction.

The evidence relating to the second count was given by Barbara Floyd, who testified that she received 15 or more capsules from the defendant Greene, which she in turn turned over to Agent Fialkewicz, who had supplied her with the money with which to procure them from Greene. You have a right, if you believe this testimony, to find that the defendant Greene has possession of the 17 capsules which Fialkewicz testified he received through Barbara Floyd; and on the basis of this finding, without anything more, you have a right, as I have indicated to you, to find the defendant guilty under that (232) count.

Count three relates to a transaction involving four capsules of heroin, alleged to have taken place on January 18, 1955. Barbara Floyd testified that she received four capsules from the defendant Greene; that she turned them over to Agent Fialkewicz; and Agent Fialkewicz testified that he received them from her. And the third count charges a violation of what we call the Import and Export Act, which I have just summarized for you, and my remarks concerning that act are equally applicable to count three,

Counts 4, 5 and 6 all relate to the same transaction claimed to have taken place on January 21st; but each of those three counts charges a violation of a different statute. The fourth count charges the sale of 30 capsules on

January 21st to Fialkewicz, not in pursuance of a written order as provided by law. The statute governing this violation reads as follows: (232)

It shall be unlawful for any person to sell, barter, exchange or give away narcotic drugs except in pursuance of a written order of the person to whom such article is sold, bartered, exchanged or given, on a form to be issued in blank for that purpose by the Secretary of the Treasury of his delegate.

In other words, it is unlawful to make any sales or transfers or deliveries or even gifts of narcotics, except pursuant to a written order, filled out on a blank form issued by the Treasury Department. The purpose of this provision is obvious. It is to control and supervise legitimate traffic in narcotics, such as are occasionally needed by physicians, and to suppress illicit traffic. (233)

The fifth count, which also relates to the transaction of January 21st, charges a violation of another statute, which reads as follows:

It shall be unlawful for any person to purchase, sell, dispense or distribute narcotic drugs except in the original stamped package or from the original stamped package, and the absence of appropriate taxpaid stamps from narcotic drugs shall be prima facie evidence of a violation of this provision by the person in whose possession the same may be found.

In other words, the violation of the law consists in purchasing or in selling or in distributing a narcotic drug except in the original stamped package or from the original stamped package. The law does not require direct proof of a purchase, sale, dispensing or distribution of a drug. The statute specifically states that the absence of appropriate taxpaid stamps from narcotic drugs shall be prima facie evidence of a violation of this subsection by the person in whose possession the same may be found. In other words, if it is proven that the defendant had possession of those drugs and that while in his possession there were no appropriate taxpaid stamps on those drugs, these facts constitute prima facie evidence of a violation of the statute and the jury may find the defendant guilty on that charge, if it sees fit to do so, without requiring any further proof. (234)

The sixth count also relates to the same transaction but charges a violation of the import and export act that I have already discussed.

The evidence in support of the 4th, 5th and 6th counts comes from Barbara Floyd, in part, who testified that she received between 20 and 30

capsules from the defendant and turned them over to Agent Tremoglie. Agent (234) Tremoglie testified that he received 30 capsules from her. He was corroborated by Agent Fialkewicz, and both agent Fialkewicz and Agent Tremoglie testified that they identified this defendant as the driver of the car in which Barbara Floyd was being driven for the rendezvous with the agents.

The 10th, 11th and 12th counts also relate to one transaction, each charging the violation of a different statute. They relate to a transaction involving 20 capsules on or about January 29th, 1955.

I am afraid I skipped the 7th, 8th and 9th counts. I will go (235) back to the 7th, 8th and 9th counts. They relate to a transaction of January 23d. The remarks I have just made related to counts 4, 5 and 6, and not 7, 8 and 9.

The testimony as to counts 7, 8 and 9 is that Barbara Floyd received 37 capsules from the defendant Greene and delivered them to Fialkewicz. The 7th count charges a violation of law in failing to have a written order -- and I have summarized that statute before. The 8th count charges a violation of the statute requiring sales in the original stamped package or from the original stamped package; and the 9th count charges a violation of the import and export act.

The 10th, 11th and 12th counts relate to a transaction that is charged to have taken place on January 29th, involving 20 capsules. Barbara Floyd testified that she received a quantity of 20 to 25 capsules from the defendant Greene. Agent Fialkewicz testified he received 20 capsules from Barbara Floyd. Fialkewicz testified that he saw the defendant Greene driving the car in which Barbara Floyd was driven to the rendezvous with the agent, and that he overheard Barbara Floyd say to the defendant Greene, "You are putting me out in front." Agent Wilson also identified the defendant Greene as the driver of the car on that occasion.

Count 10 charges a violation of the statute relating to failure (236) to have a written order. Count 11 charges a violation in dispensing and selling a drug not in the original stamped package and not from the original stamped package. And the 12th count charges a violation of the import and export act. I am not going to review those statutes again. I have explained each of them to you.

Counts 13, 14 and 15 also relate to one transaction, each count charging a violation of a different statute. This transaction is charged to have taken place on January 30th, and that it involved 33 capsules of heroin.

Barbara Floyd testified that she received 30 to 40 capsules from the (236)
defendant Greene and turned them over to Agent Fialkewicz. Agent Fialkewicz
testified he received 33 capsules from Barbara Floyd.

The 13th count charges a violation of law relating to the require-
ment of a written order. The 14th count charges a violation of the requirement
that all transfers of narcotics be in the original stamped package or from
the original stamped package. And the 15th count charges a violation of the
import and export act. I have reviewed all of those statutes before.

Now in each instance Government agents testified that there was no
written order accompanying the transaction, and no taxpaid stamps, internal
revenue stamps. The Government chemist, who analyzed all the capsules (237)
involved in each of the transactions, testified that among other things they
contained heroin.

The Government supplemented this testimony, in order to show the
defendant Greene's knowledge of what was going on, by certain testimony of
the agents, first Agent Kelly of the Narcotics Bureau. Agent Kelly testified
that back in December of 1954, these transactions having taken place in
January, 1955, he met the defendant Greene and asked him about purchasing
narcotics; the defendant Greene said that he would not handle them directly,
but that he would do so through someone else. And on a later occasion during
the same month Agent Kelly testified that he telephoned to the defendant
Greene on long distance and said that he wanted to buy two ounces, and the
defendant said "You are talking" and that the price would be \$600 an ounce;
and Agent Kelly said he would send someone for them.

Agent Jackson testified that he went to the defendant's house on
December 23d, in order to buy the one ounce of heroin for \$600. He further
testified that the defendant insisted on getting his money in advance and
stated he would deliver in two or three days. And Jackson, pursuant to
Kelly's instructions, refused to leave the money.

Agent Fialkewicz testified that on February 2d, 1955, after the
transactions involved in the indictment, he had a discussion with the (238)
defendant Greene concerning a further purchase of 30 capsules, and the
defendant Greene said that he would take care of the matter, and that Barbara
Floyd "delivers for me."

Now, ladies and gentlemen of the jury, there is one other rule of
law that is very important. The Government does not have to show that the
defendant Greene actually handled the narcotics, or that he actually sold or

delivered any of the narcotics. The law is that any person who aids or (238)
abets or assists another in committing a criminal offense may be charged
himself as a principal in that offense. If several persons act jointly or in
concert and each performs a part that results in the commission of the
offense, then all are equally guilty. For example, if a person drives an
automobile to the place where the offense is committed, in order to enable
the commission of the offense, and he knows the purpose for which he is
driving the car, he is guilty of the offense, to the same extent as the
person who actually commits the offense. Or if he performs some other part
that leads to the commission of the offense by another, he is equally guilty
with that other.

Now, ladies and gentlemen of the jury, I am going to repeat what
I said at the opening of my remarks. My discussion of the evidence is not
binding on you. If my recollection or my understanding of the evidence does
not accord with yours, then it is your recollection and your understand- (239)
ing that must prevail. The decision on the facts must be your own. It is
your responsibility and your function.

In conclusion, consider this matter in the light of the instructions
that I have given you, from the same practical approach, with the same ordinary
intelligence and using the same ordinary common sense that you would employ in
determining any other important matter that you have occasion to decide in the
course of your everyday life. You will render a separate verdict on each of
the 15 counts. In each instance your verdict should be either guilty or not
guilty. And, as of course you are aware, your verdicts must be reached by
unanimous vote.

Are there any objections or requests?

MR. LEVIN. May counsel come to the bench?

THE COURT. Yes, you may come to the bench.

(At the bench:)

MR. LEVIN. I request that the Court give the usual instruction
about witnesses not telling the truth, that if the jury believes that a
witness has not told the truth about a matter about which he could not be
mistaken, the jury would have the right to disregard the entire testimony of
that witness.

THE COURT. That is denied as coming too late. The time to make (240)
such request is before the summing up. I am not going to single out such a
request. Besides which, there is no basis for the charge, because that is

particularly appropriate where there is a conflict in the testimony. (240)

Actually I think they have to believe all or none of Barbara Floyd's testimony, and I left the entire issue of credibility of witnesses to the jury.

MR. LEVIN. May the record show I did request that, Your Honor?

THE COURT. Yes.

MR. LEVIN. And, Your Honor, as I indicated earlier, and also submitted a prayer, on the credibility of a person who is addicted to drugs.

THE COURT. Yes; I have denied that, and your objection is noted.

MR. LEVIN. Then the charge, although it originally mentioned reasonable doubt -- and I now have reference to what the Court of Appeals says in the Bellici case about the jury being instructed that they must find beyond a reasonable doubt -- when Your Honor instructed them, or the way it was presented to them, it was in such a manner as either they believed or didn't believe; and the Court of Appeals said that is not the law, that they must find beyond a reasonable doubt.

THE COURT. Yes. I said "beyond a reasonable doubt" at the beginning. I don't have to keep repeating "beyond a reasonable doubt." (241)

MR. LEVIN. I wish to make the point that in the conspiracy charge, in the charge of the importing of drugs, on the question of possession without stamps, and in the case of sale without a proper order, and also on the point of aiding and abetting and assisting, the jury should have been instructed on reasonable doubt of the essential ingredients.

THE COURT. I don't have to keep repeating "beyond a reasonable doubt." You have a right to make objections, and I suppose that right comprises a right to note frivolous objections, too.

MR. LEVIN. These are made in all seriousness.

THE COURT. They are frivolous, sir, and not lawyerlike.

MR. LEVIN. Then when the Court commented upon the purpose of the law, I feel that that is not a proper part of the charge and not an issue for the jury and should not have been made.

THE COURT. That is just an explanation to the jury so that they may understand what the case is about.

Is there anything else?

MR. LEVIN. Yes, sir.

Then when the Court commented on the evidence, which the Court had the right to do under the federal rule, the comment went beyond what the comment should have been and crossed over that line where it becomes more or (242)

less the argument of Government counsel; and I therefore take exception (242)
to it.

THE COURT. You have to state what your objection is.

MR. LEVIN. That the entire comment went beyond.

THE COURT. In what respect?

MR. LEVIN. In this respect, that -- I feel that the record will
speak for itself, Your Honor.

THE COURT. The Court considers a statement like that, without
willingness to elaborate, as an affront to the Court. However, your objection
is noted.

MR. LEVIN. Then the comment of the Court about the evidence of a
\$600 purchase, which evidence was admitted over objection of counsel. That
evidence had nothing to do with this case and was evidence of another --

THE COURT. Your rights are preserved by the objection to the
evidence.

MR. LEVIN. I noted it was mentioned in the charge, Your Honor.

THE COURT. I understand. But the Court has a right to discuss
everything in the evidence. You have preserved your rights by objecting (243)
to the evidence.

MR. LEVIN. Those are all the objections, Your Honor.

THE COURT. Very well.

Filed in Open Court (244)

May 23 1955

Harry M. Hull, Clerk

UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF COLUMBIA

Holding a Criminal Term

Grand Jury Impanelled March 31, 1955, Sworn in on April 5, 1955

The United States of America	:	Criminal No. 509-55
	:	Grand Jury No. 279-55
v.	:	196-55
Barbara E. Floyd	:	Vio. 18 U.S.C. 371
William C. Greene	:	26 U.S.C. 4704a, 4705a
	:	21 U.S.C. 174

The Grand Jury charges:

Commencing on or about December 11, 1954, and continuously thereafter
until on or about February 2, 1955, within the District of Columbia, and at a
place or places unknown to the Grand Jurors, Barbara E. Floyd and William C.
Greene, who are hereinafter referred to as the defendants, feloniously, wilfully

and
/ corruptly conspired and agreed together, and with other persons unknown (244)
to the Grand Jurors, to commit offenses against the United States, that is,
to commit offenses in violation of Title 26, Sections 4704a and 4705a,
United States Code and Title 21, Section 174, United States Code.

OVERT ACTS

At the times and places hereinafter mentioned, within the District of Columbia, the defendants committed, among others, the following overt acts in furtherance of said conspiracy and to effect the objects thereof:

1. On or about January 14, 1955, the defendant Barbara E. Floyd received \$30.00 from Walter L. Fialkewicz as payment for heroin which she stated would be delivered to him later that day.

2. On or about January 14, 1955, defendant Barbara E. Floyd informed Walter L. Fialkewicz that her boy friend was her source of supply for narcotics and that her boy friend's source of supply for narcotics was in New York City.

3. On or about January 14, 1955, defendant Barbara E. Floyd delivered to Walter L. Fialkewicz seventeen capsules of heroin for the \$30.00 referred to in Overt Act 1.

4. On or about January 18, 1955, defendant Barbara E. Floyd informed (245) Walter L. Fialkewicz she and her boy friend had been in New York City together over the weekend, and that while there her boy friend had purchased some heroin; that they had used a portion of this purchase and had both passed out because the heroin was so strong and pure.

5. On or about January 18, 1955, defendant Barbara E. Floyd sold four capsules of heroin to Walter L. Fialkewicz and stated that this heroin was part of the purchase made in New York City which is referred to in Overt Act 4.

6. On or about January 21, 1955, defendant Barbara E. Floyd received \$100.00 from Walter L. Fialkewicz as the purchase price for heroin to be delivered later.

7. On or about January 21, 1955, following receipt of the money referred to in Overt Act 6, defendant Barbara E. Floyd entered premises at 1340 Michigan Avenue, Northeast, where defendant William C. Greene was then living and remained there for approximately thirty minutes.

8. On or about January 21, 1955, immediately after leaving the premises referred to in Overt Act 7, defendant Barbara E. Floyd informed Walter L. Fialkewicz she had given the \$100.00, referred to in Overt Act 6, to her boy friend for purchase of the heroin, and that her boy friend would contact her

later that day at her place of employment and set a time for delivery of (245)
the heroin.

9. On or about January 21, 1955, defendant Barbara E. Floyd gave Walter L. Fialkewicz a piece of paper bearing the notation "National 8-3120, Extension 1120 or 1675" stating that this was the telephone number at her place of employment, and asked Walter L. Fialkewicz to call her there later that day to determine the time for delivery of the heroin referred to in Overt Act 6.

10. On or about January 21, 1955, Walter L. Fialkewicz contacted defendant Barbara E. Floyd at her place of employment at the telephone number referred to in Overt Act 9 and she instructed him to meet her at 9:30 P.M. that day at the Brentwood Village Shopping Center Parking Lot.

11. On or about January 21, 1955, at about 9:30 P.M., at the Brent- (246)
wood Village Shopping Center Parking Lot, defendant Barbara E. Floyd delivered thirty capsules of heroin to Walter L. Fialkewicz and stated that she and her boy friend would deliver the balance of the narcotic purchase referred to in Overt Act 6 at the same place at 11:30 P.M. that day.

12. On or about January 21, 1955, immediately after defendant Barbara E. Floyd had made the delivery referred to in Overt Act 11, defendant William C. Greene drove her away from that area in his 1954 Packard sedan.

13. On or about January 21, 1955, at about 11:30 P.M., defendant William C. Green drove defendant Barbara E. Floyd in his Packard automobile to the Brentwood Village Shopping Center and defendant Floyd after leaving defendant Greene's automobile informed Walter L. Fialkewicz there would be another delay but that she and her boy friend would deliver the balance of the narcotic purchase referred to in Overt Act 6 to Walter L. Fialkewicz at the Crescent Inn at 1:10 A.M. on January 22, 1955.

14. On or about January 22, 1955, at about 1:10 A.M., at the Crescent Inn defendant Barbara E. Floyd informed Walter L. Fialkewicz that the balance of the narcotic purchase referred to in Overt Act 6 could not be delivered until January 23, 1955, and she pointed to defendant William C. Greene, who was parked nearby in his Packard automobile, and identified him to Walter L. Fialkewicz as the individual whom she had previously referred to as her boy friend.

15. On or about January 23, 1955, defendant Barbara E. Floyd delivered to Walter L. Fialkewicz thirty-seven capsules of heroin as the balance of the heroin Walter L. Fialkewicz had purchased and paid for on January 21, 1955, as indicated in Overt Act 6.

16. On or about January 29, 1955, Walter L. Fialkewicz contacted (246)
defendant Barbara E. Floyd at telephone number LA 6-6787, at the address
at which defendant William C. Greene was then living, and offered to purchase
additional narcotics, whereupon Walter L. Fialkewicz heard defendant (247)
Floyd confer with someone she addressed as "Bill" and she thereupon offered
to sell Walter L. Fialkewicz eighty capsules of heroin for \$80.00, with
twenty of these capsules to be delivered at 10:00 P.M. on that day at 14th
and South Dakota Avenue, Northeast, and the balance to be delivered later.

17. On or about January 29, 1955, at about 10:00 P.M., defendant Barbara
E. Floyd arrived at 14th and South Dakota Avenue, Northeast, in a Packard
automobile driven by defendant William C. Greene, whereupon defendant Floyd
left that automobile and contacted Walter L. Fialkewicz.

18. On or about January 29, 1955, at about 10:00 P.M., defendant Barbara
E. Floyd advised Walter L. Fialkewicz that her boy friend, who had just let
her out of his automobile, was taking advantage of her by allowing her to take
so many risks to deliver his narcotics.

19. On or about January 29, 1955, at about 10:00 P.M., defendant Barbara
E. Floyd received \$80.00 from Walter L. Fialkewicz for the purchase of eighty
capsules of heroin and, at the same time, delivered twenty capsules of heroin
to Walter L. Fialkewicz and promised to deliver the balance later.

20. On or about January 29, 1955, at about 11:50 P.M., Walter L. Fialkewicz
contacted defendant Barbara E. Floyd by telephone at LA 6-6787, which was
located at the address where defendant William C. Greene was then living, and
she stated that her boy friend had just returned with some narcotics, and that
at 12:10 A.M., January 30, 1955, at 14th and South Dakota Avenue, Northeast,
she would deliver the balance of the heroin previously purchased by Walter L.
Fialkewicz.

21. On or about January 30, 1955, at about 12:10 A.M., defendant William
C. Greene drove defendant Barbara E. Floyd to the vicinity of 14th and South
Dakota Avenue, Northeast, in his Packard automobile, whereupon defendant Floyd
left that automobile and delivered to Walter L. Fialkewicz thirty-three
capsules of heroin which he had previously purchased.

22. On or about February 2, 1955, Walter L. Fialkewicz contacted defendant
William C. Greene at telephone number LA 6-6787 and defendant Greene stated
that defendant Barbara E. Floyd had been delivering narcotics for him and (248)
that he, defendant Greene, would later sell and deliver thirty capsules of
heroin to Walter L. Fialkewicz.

On or about January 14, 1955, within the District of Columbia, Barbara E. Floyd and William C. Greene facilitated the concealment and sale of a narcotic drug, that is, seventeen capsules containing a mixture totaling about 18.5 grains of heroin hydrochloride, quinine hydrochloride and milk sugar, after the said heroin hydrochloride had been imported, with the knowledge of Barbara E. Floyd and William C. Greene, into the United States contrary to law.

THIRD COUNT:

On or about January 18, 1955, within the District of Columbia, Barbara E. Floyd and William C. Greene facilitated the concealment and sale of a narcotic drug, that is, four capsules containing a mixture totaling about 4.4 grains of heroin hydrochloride, quinine hydrochloride and milk sugar, after the said heroin hydrochloride had been imported, with the knowledge of Barbara E. Floyd and William C. Greene, into the United States contrary to law.

FOURTH COUNT:

On or about January 21, 1955, within the District of Columbia, Barbara E. Floyd and William C. Greene did sell, barter, exchange and give away to Walter L. Fialkewicz a narcotic drug, that is, thirty capsules containing a mixture totaling about 32.5 grains of heroin hydrochloride, quinine hydrochloride and milk sugar, not in pursuance of a written order, written for that purpose, from the said Walter L. Fialkewicz, as provided by law.

FIFTH COUNT:

On or about January 21, 1955, within the District of Columbia, Barbara E. Floyd and William C. Greene purchased, sold, dispensed and distributed, not in the original stamped package and not from the original stamped package, a narcotic drug, that is, thirty capsules containing a mixture totaling about 32.5 grains of heroin hydrochloride, quinine hydrochloride and milk sugar. (249) This is the same heroin hydrochloride which is mentioned in the fourth count of this indictment.

SIXTH COUNT:

On or about January 21, 1955, within the District of Columbia, Barbara E. Floyd and William C. Greene facilitated the concealment and sale of a narcotic drug, that is, thirty capsules containing a mixture totaling about 32.5 grains of heroin hydrochloride, quinine hydrochloride and milk sugar, after the said heroin hydrochloride had been imported, with the knowledge of Barbara E. Floyd

and William C. Greene, into the United States contrary to law. This is (249)
the same heroin hydrochloride which is mentioned in the fourth and fifth
counts of this indictment.

SEVENTH COUNT:

On or about January 23, 1955, within the District of Columbia, Barbara E. Floyd and William C. Greene did sell, barter, exchange and give away to Walter L. Fialkewicz a narcotic drug, that is, thirty-seven capsules containing a mixture totaling about 38.7 grains of heroin hydrochloride, quinine hydrochloride and milk sugar, not in pursuance of a written order, written for that purpose, from the said Walter L. Fialkewicz, as provided by law.

EIGHTH COUNT:

On or about January 23, 1955, within the District of Columbia, Barbara E. Floyd and William C. Greene purchased, sold, dispensed and distributed, not in the original stamped package and not from the original stamped package, a narcotic drug, that is, thirty-seven capsules containing a mixture totaling about 38.7 grains of heroin hydrochloride, quinine hydrochloride and milk sugar. This is the same heroin hydrochloride which is mentioned in the seventh count of this indictment.

NINTH COUNT:

On or about January 23, 1955, within the District of Columbia, Barbara E. Floyd and William C. Greene facilitated the concealment and sale of a narcotic drug, that is, thirty-seven capsules containing a mixture totaling about 38.7 grains of heroin hydrochloride, quinine hydrochloride and milk sugar, after the said heroin hydrochloride had been imported, with the knowledge of Barbara E. Floyd and William C. Greene, into the United States contrary to law. (250)
This is the same heroin hydrochloride which is mentioned in the seventh and eighth counts of this indictment.

TENTH COUNT:

On or about January 29, 1955, within the District of Columbia, Barbara E. Floyd and William C. Greene did sell, barter, exchange and give away to Walter L. Fialkewicz a narcotic drug, that is, twenty capsules containing a mixture totaling about 19.5 grains of heroin hydrochloride, quinine hydrochloride and milk sugar, not in pursuance of a written order, written order, written for that purpose, from the said Walter L. Fialkewicz, as provided by law.

ELEVENTH COUNT:

On or about January 29, 1955, within the District of Columbia, Barbara E. Floyd and William C. Greene purchased, sold, dispensed and distributed, not in

the original stamped package and not from the original stamped package, (250)
a narcotic drug, that is, twenty capsules containing a mixture totaling about
19.5 grains of heroin hydrochloride, quinine hydrochloride and milk sugar.
This is the same heroin hydrochloride which is mentioned in the tenth count
of this indictment.

TWELTH COUNT:

On or about January 29, 1955, within the District of Columbia, Barbara E. Floyd and William C. Greene facilitated the concealment and sale of a narcotic drug, that is, twenty capsules containing a mixture totaling about 19.5 grains of heroin hydrochloride, quinine hydrochloride and milk sugar, after the said heroin hydrochloride had been imported, with the knowledge of Barbara E. Floyd and William C. Greene, into the United States contrary to law. This is the same heroin hydrochloride which is mentioned in the tenth and eleventh counts of this indictment.

THIRTEENTH COUNT:

On or about January 30, 1955, within the District of Columbia, Barbara E. Floyd and William C. Greene did sell, barter, exchange and give away to Walter L. Fialkewicz a narcotic drug, that is, thirty-three capsules containing a mixture totaling about thirty-three grains of heroin hydrochloride and (251)
milk sugar, not in pursuance of a written order, written for that purpose, from the said Walter L. Fialkewicz, as provided by law.

FOURTEENTH COUNT:

On or about January 30, 1955, within the District of Columbia, Barbara E. Floyd and William C. Greene purchased, sold, dispensed and distributed, not in the original stamped package and not from the original stamped package, a narcotic drug, that is, thirty-three capsules containing a mixture totaling about thirty-three grains of heroin hydrochloride, quinine hydrochloride and milk sugar. This is the same heroin hydrochloride which is mentioned in the thirteenth count of this indictment.

FIFTEENTH COUNT:

On or about January 30, 1955, within the District of Columbia, Barbara E. Floyd and William C. Greene facilitated the concealment and sale of a narcotic drug, that is, thirty-three capsules containing a mixture totaling about thirty-three grains of heroin hydrochloride, quinine hydrochloride and milk sugar, after the said heroin hydrochloride had been imported, with the knowledge of Barbara E. Floyd and William C. Greene, into the United States contrary to law. This is the same heroin hydrochloride which is mentioned in the thirteenth

and fourteenth counts of this indictment.

(251)

/s/ Leo A Rover
Attorney of the United States in
and for the District of Columbia

A TRUE BILL:

Harry Gandy, Jr.
Foreman.

PLEA OF DEFENDANT

(252)

On this 27th day of May, 1955, the defendant William C. Green, appearing in proper person and by his attorney J. Leon Williams, Esquire, being arraigned in open Court upon the indictment, the substance of the charge being stated to him, pleads Not Guilty thereto.

By direction of
LUTHER W. YOUNGDAHL
Presiding Judge
Criminal Court No. 1

Filed

(256)

Feb 2, 1956

Harry M. Hull, Clerk

DEFENDANT'S REQUEST FOR INSTRUCTIONS

1. You are instructed that it is a well recognized fact that a drug addict is inherently a perjurer where her own interests are concerned, and that the testimony of a drug addict should be received with suspicion and acted upon with caution.

Fletcher Case 81 App. D.C. Denied

On this 2nd day of February, 1956, came again the parties aforesaid, (257) and the same jury as aforesaid in this cause, the hearing of which was rescheduled yesterday; where the said jury after hearing further of the evidence and the instructions of the Court, alternate jurors, William F. Webb and John B. Chismar, are discharged from further consideration in this case; and thereupon the jury retires to consider their verdict.

The jury returns into Court and upon their oath say that the defendant is guilty as indicted.

The case is referred to the Probation Officer of the Court and the defendant is remanded to the District of Columbia Jail.

By direction of
ALEXANDER HOLTZOFF
Presiding Judge
Criminal Court No. 3

AFFIDAVID IN SUPPORT OF APPLICATION FOR LEAVE TO
PROCEED WITHOUT PREPAYMENT OF COSTS

(258)

I, William C. Greene, being first duly sworn according to law, depose and say that I am the _____ in the above-entitled cause, and, in support of my application for leave to proceed in said cause without being required to prepay fees or costs, state as follows:

1. That I am a citizen of the United States.
2. That because of my poverty I am unable to pay the costs of said suit or action.
3. That I am unable to give security for the same.
4. That I believe I am entitled to the redress I seek in said suit or action.
5. That the nature of my cause of action is briefly stated as follows:

Appeal

/s/ William C. Greene

SUBSCRIBED and SWORN to before me this 15th day of February, 1956.

Filed

/s/

Feb 21 1956

Notary Public, D. C.

Harry M. Hull, Clerk

Application to proceed on Appeal without prepayment of costs, denied, first because there is no substantial question; & second, the defendant makes an insufficient showing of poverty. He was represented at trial by retained counsel.

/s/ Alexander Holtzoff

On this 10th day of February, 1956 came the attorney for the govern- (259)
ment and the defendant in person and by counsel, Joseph Levin, Esquire.

It is Adjudged that the defendant has been convicted upon his plea of Not Guilty and a verdict of guilty of the offense of Violation of Section 371, Title 18, Sections 4704a, 4705a, Title 26 and Section 174, U. S. Code and the
as charged
court having asked the defendant whether he has anything to say why judgment should not be pronounced, and no sufficient cause to the contrary being shown or appearing to the Court,

It Is Adjudged that the defendant is guilty as charged and convicted.

It Is Adjudged that the defendant is hereby committed to the custody of the Attorney General or his authorized representative for imprisonment for a period of Twenty (20) Months to Five (5) Years and to pay a fine of Five Hundred (\$500.00) Dollars on Count Two; Twenty (20) Months to Five (5) Years and to pay a fine of Five Hundred (\$500.00) Dollars on Count Four, said sentence on Count Four to take effect at the expiration of sentence imposed on Count Two;

Twenty (20) Months to Five (5) Years and to pay a fine of Five Hundred (259)
(\$500.00) Dollars on Count Seven, said sentence on Count Seven to take effect
at the expiration of sentence imposed on Count Four; Twenty (20) Months to
Five (5) Years and to pay a fine of Five Hundred (\$500.00) Dollars on each
of Counts One, Three, Five, Six, Eight, Nine, Ten, Eleven, Twelve, Thirteen,
Fourteen and Fifteen, said sentences by the Counts to run concurrently and to
run concurrently with the sentences imposed on Counts Two, Four and Seven.

It Is Ordered that the Clerk deliver a certified copy of this judgment
and commitment to the United States Marshal or other qualified officer and
that the copy serve as the commitment of the defendant.

/s/ Alexander Holtzoff

J U D G E

CRIMINAL DOCKET

(264)

UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

CASE CLOSED

Parties	Attorneys	Criminal No.
United States	U.S. Attorney McLAUGHLIN	G.J. No. 509-55
vs.		
1. BARBARA E. FLOYD	1. Stanley Dietz	196-55
2. WILLIAM C. GREENE	2. J. Leon Williams	279-55
		Charge
		VIO.T. 18, USC 371
		VIO.T. 26, USC 4704a,
		4705a,
		VIO.T. 21, USC 174
	Date filed	Bond:
	2-11-55	\$3500.00 M.N. Robinson
	3-7-55	\$3000.00 M.N. Robinson

Date	No. 1,2:	Proceedings
		Presentment and indictment filed (15 counts)
1955 May 23	No.1,2:	Copy of indictment given to deft. Cert. filed.
May 24	No.2:	Appearance of J. Leon Williams entered.
May 25	No.1:	ARRAIGNED, Plea NOT GUILTY entered; Deft. granted 20 days to file motions; Deft. on bond; Appearance of Stanley Dietz entered and filed; Attorney Stanley Dietz present. LAWS, C.J. (Reporter-Powell) Cert. filed.
May 27	No.2:	ARRAIGNED, Plea NOT GUILTY entered; Deft. on Bond; Appearance of J. Leon Williams entered and filed. J. Leon Williams present. YOUNGDAHL, J. (Reporter-Frye) Cert. filed.

- 1955 Jun 16 No.2: Certified copy of entries from the Circuit Court of Montgomery County, Md., filed.
Bench Warrant Ordered & Issues. HOLTZOFF, J. (In Chambers)
- Nov 2 No.2: Defendant surrendered by M. N. Robinson, Surety.
SURETY EXONERATED;
- Nov 2 No.2: Deft. committed to the District of Columbia Jail.
Commitment Issued.
Bond set by the Court in the sum of \$3000.00
Attorney J. Leon Williams present.
McGARRAGHY, J. (Reporter-Thiel)
- Nov 2 No.2: Bench Warrant returned executed.
Deft. committed to the District of Columbia Jail.
Commitment Issued.
- Nov 4 No.2: Motion of deft. for Discovery and Inspection, filed.
Cert. of Serv.
- Nov 8 No.1: Plea Not Guilty withdrawn, Plea GUILTY entered to Count one (conspiracy)
Case is REFERRED to the Probation Officer of the Court;
Deft. permitted to remain on bond pending sentence:
Attorney Stanley Dietz present.
McGUIRE, J. (Reporter-Rawls) Cert. filed.
- Nov 8 No.2: Plea Not Guilty withdrawn, Plea GUILTY entered to Counts one and seven;
Case is REFERRED to the Probation Officer of the Court;
Deft. remanded to the District of Columbia Jail;
Attorney J. Leon Williams present.
McGUIRE, J. (Reporter-Rawls) Cert. filed.
- Nov 16 No.2: Motion of deft. to withdraw Plea of Guilty, filed, Cert. of Serv.
- Dec 2 No.2: Motion of deft. to withdraw Plea of Guilty heard, argued and granted. Trial date set for Jan. 5, 1956.
Deft. remanded to the District of Columbia Jail.
Attorneys J. Leon Williams and J. Levin present.
McGUIRE, J. (Reporter-Rawls) Cert. filed.
- 1956 Feb 1 No.2: JURY AND TWO ALTERNATE JURORS FROM CRIMINAL COURTS NO. 3 and 5 SWORN:
- | | |
|---------------------|---------------------|
| John R. Cummings | Joseph E. Freeman |
| Nancy V. Dennis | Mordecai M. Harris |
| Warren F. Dellinger | Donald G. Warder |
| George R. Flynn | Gladys T. Keen |
| Flossie L. Street | Charles C. McElveen |
| Mary D. Sowell | Alice C. Simmons |
- Alternate Jurors Sworn:
a.1. William F. Webb a.2. John B. Chismar
Case is RESPITED until to-morrow morning:
Deft. remanded to the District of Columbia Jail;
Attorney Joseph Levin present.
HOLTZOFF, J. (Reporter-O'Neal) Cert. filed.

1956 Feb 2 No.2: TRIAL RESUMED; same jury;

Two alternate jurors discharged

Jury retires to consider their verdict:

VERDICT: Guilty as indicated;

Case is REFERRED to the Probation Officer of the Court;

Deft. remanded to the District of Columbia Jail;

Deft's. request for instruction, filed;

Attorney Joseph Levin present.

HOLTZOFF, J. (Reporter-O'Neal) Cert. filed.

Feb 10 No.1 - BARBARA E. FLOYD:

SENTENCED to imprisonment for a period of

Twenty (20) months to Five (5) years and to

PAY a FINE of Fifth Dollars (\$50.00):

Execution of sentence Suspended:

Defendant Placed on PROBATION in charge of the

Probation Officer of the Court for a period of

Five (5) years:

Recognizance in the sum of One Hundred Dollars

(\$100.00) taken:

Attorney Stanley Dietz present.

HOLTZOFF, J. (Reporter-O'Neal) J.I.

Feb 10 No.2 - WILLIAM C. GREENE:

SENTENCED to imprisonment for a period of

Twenty (20) months to Five (5) years on each Counts

2,4,7 and TO PAY A FINE of Five Hundred Dollars

(\$500.00) on Counts 2,4,7;

said sentence by the counts to run CONSECUTIVELY:

Twenty (20) months to Five (5) years and to PAY A FINE

of Five Hundred Dollars (\$500.00) on each of Counts

1,3,5,6,8,9,10,11,12,13,14,15:

said sentence by the counts to run CONCURRENTLY and

to run CONCURRENTLY With sentence imposed on Counts

2,4 and 7.

Defendant remanded to the District of Columbia Jail:

No.1: Attorney Stanley Dietz present.

No.2: Attorney Joseph Levin present.

HOLTZOFF, J. (Reporter-O'Neal) J.I.

Feb 16 No.1: Judgment & Probation of 2-10-56, filed. HOLTZOFF, J.

1956 Feb 16 No.2: Affidavit in support of Application for leave to proceed on

Appeal without prepayment of costs, FILED. (Prepared by the deft.)

Feb 17 No.2: Judgment & Commitment of 2-10-56, filed. HOLTZOFF, J.

Feb 21 No.2: Defendant's affidavit in support of application for leave to proceed on Appeal without prepayment of costs, DENIED, first because there is no substantial question; and second,

the defendant makes an insufficient showing of poverty.
He was represented at the trial by retained counsel.
HOLTZOFF, J. (N)

1956 May 3 No.1,2: TRANSCRIPT OF PROCEEDINGS:

Pages 1-18, November 8, 1955, filed.
(Court's Copy) (Reporter-Rawls)

Sep 5 No.2: TRANSCRIPT OF PROCEEDINGS:

Pages 1-25, February 2, 1956, FILED.
(File copy) (Reporter-O'Neal)

1956 Oct 19 No.2: Certified copy of Order from United States Court of Appeals for the District of Columbia Circuit allowing the defendant to proceed on Appeal IN FORMA PAUPERIS from the Judgment of the District Court on 2-10-56; and ORDERING that the STENOGRAPHIC TRANSCRIPT of the proceedings at the trial be prepared at the expense of the United States and that the record on Appeal, including that stenographic transcript and the stenographic transcript of the charge to the jury, which has already been prepared, shall be prepared by the Clerk of the District Court as promptly as possible, and shall be transmitted by him to this Court within forty days, FILED. dated 10-18-56.

1956 Oct 26 No.2: DESIGNATION OF RECORD ON APPEAL, filed. Cert. of Serv.

1956 Oct 31 No.2: COUNTERDESIGNATION of RECORD, filed. Cert. of Serv.

P R O C E E D I N G S

(270)

THE DEPUTY CLERK. William C. Greene.

THE COURT. The Court will hear counsel.

MR. LEVIN. Counsel has nothing to say, Your Honor.

THE COURT. Greene, is there anything you would like to say?

DEFENDANT GREENE. Nothing, Your Honor.

THE COURT. This is a narcotic offense of an exceedingly aggravated character, because apparently this defendant has been dealing in narcotics, in large quantities, for a considerable period of time. Some of the counts involve quantities as large as 40 capsules. There are 15 counts in this indictment.

William C. Greene, it is the judgment of this Court that on counts 2, 4 and 7 you be imprisoned in an institution to be designated by the Attorney General of the United States for a term of not less than 20 months and not more than five years, and that you be fined \$500.00, the sentences to run consecutively; that on each of the other counts in the indictment you be imprisoned for a term of 20 months to five years and be fined \$500.00, the sentences on the other counts to run concurrently with the sentences on counts 2, 4 and 7.

In other words, the aggregate sentence is not less than five years and (270)
not more than 15 years, and a \$1,500.00 fine.

THE DEPUTY CLERK. Barbara E. Floyd, step forward, please; (271)
Mr. Stanley Dietz.

THE COURT. Mr. Dietz, the Court will hear you.

MR. DIETZ. May it please Your Honor, I appear before Your Honor
this morning to explain some factors which I consider in mitigation of this
young lady's crimes. As Your Honor well knows -- I am sure you have a very
vivid recollection of the trial of this case -- this young lady entered a
plea of guilty to a charge of conspiracy to violate the narcotic laws, and
she appeared as a Government witness. I am frankly of the opinion, Your
Honor, that the Government would have had a very, very difficult time to
gain a conviction against the true offender in this case without the testimony
of this girl, my client.

I ask Your Honor to take into consideration the fact that (274)
immediately after she came in to my office she went down to the United States
Attorney's Office and cooperated fully. She supplied them with names. She
supplied them with addresses. She assisted the Government in every way she
could possibly do it. It was based on her statement principally, I believe,
that they were able to gain an indictment and a conviction against the true
offender, the man who was behind her.

MR. MC LAUGHLIN. The only thing the Government would like to (275)
say at this time is that this defendant has cooperated with the Government,
and I believe my friend was right when he said we would have some question of
making the case without her testimony. Of course, under those conditions of
cooperation with the Government, I believe some consideration should be shown.

Of course we find ourselves in the position, as far as our particular
office is concerned, Your Honor, at the time that these people do come in and
are willing to cooperate with the Government, we are in the position where we
can't promise them anything. We can't give them any assurances of what their
sentences might be, or in any sense that they would get certain consideration
shown. So that the only thing we do tell them is that any cooperation on their
part, we will bring it to the attention of the sentencing judge so that he can
take that into consideration. And I believe in this situation this defendant
should be shown some consideration.

THE COURT. This case is a rather extraordinary and unusual one. (276)

Here we have a young woman of good family, and with a good job, getting (276) herself entangled in the narcotic traffic. Under ordinary circumstances I would not even consider probation or any other form of leniency. But I do have to consider the interests of law enforcement. As a result of her assistance to the Government, a large-scale purveyor has been apprehended, convicted and sentenced to a long term of imprisonment. And, after all, the really constructive thing to be done to suppress the vicious and nefarious practice is to try to get after the large purveyor and the sources of supply. And this is one of those cases in which a large purveyor, in the sense of one of the sources of supply, has been detected and convicted. And as the Assistant United States Attorney stated, and from what I observed during the trial, probably the Government would not have secured a conviction except for this defendant's testimony.

I think that this is a practical consideration to which considerable weight must be given. I do not recall ever having put a defendant in a (277) narcotic case on probation. Perhaps I have once or twice; but if so I do not recall it. This is an exceptional case, and because of the assistance rendered the Government, first in detecting and apprehending the defendant Greene, and then securing his conviction by the frank and unhesitating way in which she testified at the trial, I am going to make an exception in this case and put the defendant on probation. However, I am going to impose a long period of probation, and she will be under very close supervision on the part of the probation department of this Court during the entire period. I think that is for her own good, and it is necessary in the interests of the public.

Barbara E. Floyd, it is the judgment of this Court that you be imprisoned in an institution to be designated by the Attorney General of the United States for a term of not less than 20 months and not more than five years, and that you be fined \$50. The execution of this sentence, both as to imprisonment and as to the fine, will be suspended and you will be placed on probation for five years.

MR. MCLAUGHLIN. Your Honor, the Government will make a motion (278) to dismiss the balance of the counts in that indictment so far as the defendant Barbara E. Floyd is concerned.

THE COURT. Motion to dismiss is granted.

- - - -

FOR BINDING.

*United States Court of Appeals
For the
District of Columbia Circuit*

FILED JAN 17 1957

Joseph W. Stewart
CLERK

BRIEF FOR APPELLANT

IN THE
UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 13,621

WILLIAM C. GREENE, Appellant

v.

THE UNITED STATES, Appellee

Appeal From A Judgment Of The United States
District Court For The District Of Columbia

James H. Heller
Attorney for Appellant
1026 Woodward Building
Washington 5, D.C.

QUESTIONS PRESENTED

In a prosecution on one count for conspiracy with another to violate the narcotics laws and on 14 substantive counts for aiding and abetting sales in violation of those laws:

1. Where the proof of the conspiracy itself as well as the overt acts is necessarily identical with any proof of responsibility for the substantive crimes, can the defendant be convicted of the latter crimes as well as conspiracy?

2. Where the evidence shows that only one purchase was made but that the heroin was delivered in two installments, can the defendant be convicted of two separate sales in connection with that transaction?

3. Can the separate acts and statements of the alleged co-conspirator who is not on trial be put in evidence against the defendant without prior independent proof that a conspiracy did in fact exist between the two?

4. In support of the conspiracy charge is evidence admissible which at most tends to show that under circumstances strongly suggesting entrapment a disguised narcotics agent had previously sought but failed to purchase narcotics from one (but not both) of the alleged co-conspirators?

5. Can conviction on all 15 counts be sustained on the basis of a consistently biased charge to the jury which contained erroneous instructions on the decisive issues of aiding and abetting, the credibility of the alleged co-conspirator (an accomplice and an addict), and the elements of proof under the statutes allegedly violated, which distorted major evidence, and which as a whole excluded every legal and factual hypothesis of innocence?

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26 U.S.C. (1954) 4704(a)	1,2,11,16,17,34,40,41,App.
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IN THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 13,621

WILLIAM C. GREENE, Appellant,

v.

THE UNITED STATES, Appellee.

Appeal From The United States District Court
For The District of Columbia

BRIEF FOR APPELLANT

JURISDICTIONAL STATEMENT

Appellant was indicted, tried and convicted in the court below on one count charging conspiracy to violate the federal narcotics laws,^{1/} contrary to 62 Stat. 701, 18 U.S.C. 371, and on 14 counts charging substantive violations of those laws,^{1/} all within the District of Columbia. The indictment appears at J.A. 88-95, and the judgment and commitment, dated February 10, 1956, appear at J.A. 96, 97. On February 15, 1956, appellant applied to the court below "for leave to proceed without prepayment of costs," (J.A. 96) but on February 21, 1956, this application was denied by Judge Holtzoff, who had also been the trial and sentencing judge (J.A. 96). Petitioner then filed with this Court his petition for leave to prosecute

^{1/} The specific statutes are 35 Stat. 614, as amended, 21 U.S.C. 174; 68A Stat. 550, as amended, 26 U.S.C. (1954 Code) 4704(a), formerly 26 U.S.C. (1939 Code) 2553(a); and 68A Stat. 551, as amended, 26 U.S.C. (1954 Code) 4705(a), formerly 26 U.S.C. (1939 Code) 2554(a). Throughout the remainder of this brief these statutes are referred to by their current United States Code citations: "21 U.S.C. 174"; "26 U.S.C. 4704(a)"; and "26 U.S.C. 4705(a)."

an appeal in forma pauperis (Misc. Docket No. 638 of this Court), and the Court granted that petition in an order dated October 18, 1956 (docket entry, J.A. 100). The jurisdiction of this Court is invoked under 28 U.S.C., secs. 1291 and 1915.

STATEMENT OF THE CASE

The Indictment (J.A. 88-95) jointly charged appellant and one Barbara E. Floyd with conspiracy to violate certain federal narcotics laws and 14 substantive violations of those same laws, based on six alleged transactions occurring between January 14 and 30, 1955. The specific statutes allegedly violated, the alleged criminal conduct, the relevant substantive counts of the indictment and the dates of the alleged offenses are as follows:

- (i) 21 U.S.C. 174: Facilitating the concealment and sale of heroin known to have been unlawfully imported into the United States. Count 2, January 14, 1955; count 3, January 18, 1955; count 6, January 21, 1955; count 9, January 23, 1955; count 12, January 29, 1955; count 15, January 30, 1955. (Six counts).
- (ii) 26 U.S.C. 4704(a): Purchase, sale, dispensing and distributing heroin not in or from the original stamped package. Count 5, January 21, 1955; count 8, January 23, 1955; count 11, January 29, 1955; count 14, January 30, 1955. (Four counts).
- (iii) 26 U.S.C. 4705(a): Sale, barter, exchange and giving away heroin to Walter Stanley Fialkewicz not in pursuance of a written order as required by law. Count 4, January 21, 1955; count 7, January 23, 1955; count 10, January 29, 1955; count 13, January 30, 1955. (Four counts).

The indictment recites that for each of the latter four dates, viz., January 21, 23, 29 and 30, 1955, the heroin mentioned in counts 4, 5 and 6; 7, 8 and 9; 10, 11 and 12; and 13, 14, and 15, respectively, is the same (J.A. 92-95, passim). In other words, in connection with the two transactions occurring January 14 and 18, 1955, the defendants were indicted solely under 21 U.S.C. 174, while in connection with each of the remaining four transactions, they were indicted under all three statutes. The conspiracy count (count 1) alleged 22 "overt acts," 21 of which related to the six sales charged in the substantive counts; the 22nd referred to an alleged meet-

ing between appellant and Fialkewicz on February 2, 1955 (J.A. 88-91).

The Pattern of the Evidence. At the outset, the prosecutor informed the trial court that the evidence of conspiracy and the substantive crimes would be the same, excepting the testimony given by two agents named Kelly and Jackson (R. 18, 19).^{2/} Co-defendant Barbara Floyd and Federal Narcotics Bureau agent Walter Stanley Fialkewicz were the Government's chief witnesses; certain other agents corroborated their testimony in part. There were no witnesses for the defense. The evidence tended to show that Floyd first met Fialkewicz, who was under assumed identity, on January 4, 1955, and on that night and five subsequent nights ending with January 30th delivered to him varying amounts of heroin capsules in exchange for money which Fialkewicz gave her for that purpose either at the time or at a prior meeting. In each case Floyd testified that she had secured the capsules from appellant, either on the date in question or at some previous time. There were also other meetings between Floyd and Fialkewicz, either to arrange the purchases, to give her the purchase money, or to inform Fialkewicz that delivery of the capsules would have to be made at a later date. Appellant drove Floyd to and from all but one (J.A. 7, 51) of her meetings with Fialkewicz between January 21 and 29. However, at no time did either Fialkewicz or the other agents who testified see either the narcotics or the marked money Fialkewicz paid for them in appellant's possession (J.A. 22, 23, 64, 65, 70, 71, 74).

The evidence concerning the six sales by Floyd and appellant's part in the events relating to them is as follows:

On January 14, 1955 (Count 2), agent Fialkewicz acting under an assumed identity, initially met Floyd after work, outside her place of employment. After a conversation in his car he gave her \$30 to purchase narcotics. She left his car

^{2/} By inadvertence this colloquy was omitted from the Joint Appendix designated by counsel for appellant.

and met him for dinner later than night in downtown Washington. Apparently after dinner she gave Fialkewicz 17 heroin capsules (J.A. 1-3, 41-43).

Floyd testified that between these two meetings she went to appellant and "exchanged the money for heroin, to give it to Fialkewicz" (J.A. 3), but there is no evidence that she told appellant why she wanted the heroin or that he independently knew why. He was not present at her meetings with Fialkewicz. There was no evidence as to how Floyd met Fialkewicz or that appellant knew of his existence at this time.

Again on January 18, 1955 (Count 3), Fialkewicz (accompanied by agent Tremoglie) picked Floyd up after work. He again took her to dinner, and after dinner they drove to Floyd's home. There Fialkewicz gave Floyd \$8, she entered the house, and returned with 4 heroin capsules which she gave to Fialkewicz (J.A. 3, 4, 43, 44, 66).

Floyd testified that the 4 capsules were "(f)rom William Greene, that I had had" (J.A. 4). She did not say how long she had had them or what she had told appellant when she had allegedly got them from him. Again appellant was not present and there is no evidence that he knew of Fialkewicz or of Floyd's relations with him at that time.

January 21 through 23, 1955 (Counts 4 to 6 and 7 to 9).

On the morning of January 21, Fialkewicz and Tremoglie after first telephoning Floyd to arrange a purchase of heroin, picked her up before work and drove her to a point very near appellant's house where Fialkewicz gave her \$100 for the purchase. She entered appellant's house and returned shortly later to be driven to work. Before she left their car, she told Fialkewicz to call her later that morning (J.A. 4, 5, 45, 66).

Floyd testified that while at appellant's house, she gave appellant the money from Fialkewicz and he told her to call him later that morning (J.A. 4); that she did so, but that he didn't "have anything at the time" (J.A. 5); and that finally after a series of conversations between herself and appellant and herself and Fialkewicz, a meeting was arranged

for that same evening in order to deliver heroin capsules to Fialkewicz (J.A. 5).

The meeting place was at Brentwood Village, 14th and Rhode Island Avenue, N. E. Appellant drove Floyd to and from the meeting, but went into a drugstore and remained there (J.A. 68, 47) while Floyd and Fialkewicz met at the agent's automobile about a half block away (J.A. 46, 47, 68). Floyd gave the agents 30 heroin capsules (J.A. 5, 47, 68) which, she testified, she had received from appellant (J.A. 5). She also told them to return to that spot at 11:30 that night to receive the rest of the capsules which Fialkewicz had purchased, then rejoined appellant and drove away with him (J.A. 47, 68, 69).

Appellant also drove Floyd to and from the 11:30 meeting and to a third meeting that night--actually early in the morning of January 22nd--in front of a downtown Washington restaurant. On both occasions she met the agents alone and told them she was unable to "obtain" (J.A. 51) any capsules for them. On neither occasion did appellant speak to either Floyd or Fialkewicz (J.A. 5-7, 47-51). At the third meeting, downtown, Floyd told Fialkewicz to call her the next (i.e. that) day, the 22nd, when, she testified, appellant told her she could get the "rest of" the capsules (J.A. 7). However, the agents were out of town that day. Finally, Fialkewicz picked up 37 more capsules at Floyd's home on Sunday, January 23rd (J.A. 7, 8, 51), thus completing the purchase begun by Fialkewicz two days earlier. Floyd testified she had gotten these 37 capsules from appellant the day before (J.A. 8). Appellant was evidently not present when Fialkewicz picked them up on the 23rd, however (J.A. 7, 8, 51).

January 29 and 30, 1955 (Counts 10, 11, 12 and 13, 14, 15). On the evening of January 29th Fialkewicz again telephoned Floyd at her home to arrange the purchase of heroin. When he called again a little later she had left instructions for him to call her at appellant's house. He did so and reached her there. While the agent discussed a possible purchase with

her, she, on her end of the call, consulted with someone in the room whom she called "Bill" (J.A. 8, 9, 54, 55). She testified this was appellant and he told her to arrange a meeting with Fialkewicz in order to get the money from him a short time later at a nearby intersection (J.A. 8, 9). Appellant drove Floyd to this meeting and then drove off while it was taking place. Fialkewicz gave Floyd \$80 and she gave him 20 heroin capsules, telling him to call appellant's number later that evening to make arrangements for "the remainder of the heroin" (J.A. 9, 10. See also J.A. 56, 57 and 58, 59).

Fialkewicz did telephone Floyd again as directed, several times, and on the last call she told him to meet her in ten minutes at the same intersection (J.A. 11, 58, 59). Floyd testified that during this last phone call appellant entered his house, presumably with the remaining capsules (J.A. 11). This second meeting occurred shortly after midnight, i.e. about 12:10 a.m. on January 30th (J.A. 59). Appellant drove Floyd to the meeting and she turned over to Fialkewicz 37 capsules of heroin (J.A. 11, 59). At neither of these meetings between Floyd and Fialkewicz was appellant present or within hearing, so far as the evidence shows. Each time Floyd left appellant's car for her meeting with the agent, as she had done previously (J.A. 10, 11, 56, 57, 59).^{3/}

^{3/} Fialkewicz testified that while approaching appellant's car at the meeting on January 29, 1955 (counts 10-12), he heard Floyd say to appellant that he "was putting her out in front" (J.A. 56), but Floyd failed to testify to making such a statement although she could have given the best evidence of it, if true. Nor was there any evidence of an answer or reaction by appellant. As to the truth of what Fialkewicz quoted Floyd as saying, this was hearsay in any event, for reasons stated below, See III A, below.

Although Fialkewicz always gave Floyd marked money and although appellant's person and house were searched during his arrest on February 9, 1956, neither the money nor any narcotics was found in his possession (J.A. 64, 65). Nor was any narcotic ever seen in appellant's possession during the "incidents" described below.

Evidence of Other "Incidents" Introduced In Support of the Conspiracy Charge (Count 1). Although it relied principally on the foregoing "substantive" incidents to support this charge, the Government also introduced evidence of two other alleged "incidents."

On February 2, 1955 (Overt Act 22), three days after the last sale alleged in the indictment, Fialkewicz testified that he had phoned appellant's house to speak to Floyd, but when appellant had answered the phone he had identified himself by an assumed name and by the prior meetings on January 29 and 30 and had said he wanted to speak to Barbara Floyd to "pick up" 30 capsules; that appellant had stated that Floyd was not there but "she delivered for me", and that "I will take care of you," i.e. Fialkewicz; but that by arrangement appellant had called him back and arranged to meet in a few minutes at a restaurant (J.A. 62). At that meeting, Fialkewicz said, appellant requested the money in advance, but, after Fialkewicz' refusal, agreed to meet him again a half hour later in a parking lot. However, at the appointed place and time appellant merely drove up with another unidentified man, halted briefly, nodded to Fialkewicz, and then drove off (J.A. 63).

The Kelly and Jackson Testimony (December, 1954). This "incident" was not even alleged in the indictment. Agent Kelly, normally stationed in Greensboro, North Carolina, testified that he came to Washington and under an assumed name contacted appellant by telephone on December 11, 1954. He arranged to meet appellant at a restaurant that day, and appellant arrived with Barbara Floyd. So far as is shown, her presence there was fortuitous (J.A. 29, 30). Kelly gave appellant a letter of introduction from a friend of the latter's

John Kimer, who was then in jail, and Kelly broached the idea of selling narcotics to raise money for bail for Kimer, as a mutual friend (J.A. 30, 31). Kelly testified that appellant said he would call Kelly the next day, did so, and arranged to meet Kelly in another restaurant. There they discussed narcotics further and, Kelly said, appellant told him that he would only deal with Kelly through an "Andrea Rogers" (J.A. 31-33). The following day, appellant allegedly called to say he was sending Andrea Rogers over to talk to Kelly, but apparently such a meeting never took place, nor any further conversations with appellant before Kelly left town on December 15th (J.A. 33, 34). There is no evidence who "Andrea Rogers" was.

On December 22, 1954, Kelly testified that he was again back in Greensboro whence he called appellant to make arrangements to buy 2 ounces of unspecified narcotics at \$600 per ounce. Kelly agreed to send a man up to see appellant (J.A. 34, 35). Agent Jackson, normally assigned to Baltimore, was this man. He testified that he called appellant and came to his house the next day, December 23rd; that appellant wanted payment in advance, whereupon Jackson got Kelly on the telephone (J.A. 38, 39). Kelly talked to both Jackson and appellant. He refused to permit payment in advance, and told Jackson not to deal with appellant (J.A. 35, 36, 39). After this telephone conversation Floyd came into the room and Jackson was introduced to her (J.A. 12, 39), apparently by her own name, although Jackson, of course, had an assumed name (J.A. 39). Jackson then left, almost at once (J.A. 39). Apparently neither he nor Kelly had further contact with appellant. Neither of them ever saw any narcotics in appellant's possession (J.A. 36, 40).

At the end of agent Kelly's testimony, counsel for appellant objected to it in its entirety on grounds that it was not tied in with the indictment, but the objection was overruled as tardy and not well taken (J.A. 37, 38). The objection was renewed at the end of the judge's charge and overruled again (J.A. 88).

Barbara Floyd was the Government's indispensable witness, as is evident from the foregoing recital. She gave practically the entire testimony which tended to incriminate appellant on the basis of his participation in the events during the period of January 21 to 30, 1955 (counts 4-15). Without her there was little more than his physical presence shown by the agent's testimony. At the trial the judge referred to Floyd as "the complete witness" (J.A. 75) and subsequently he stated that "probably the Government would not have secured a conviction except for (her) testimony" (J.A. 102). The prosecutor agreed (J.A. 101). The trial judge evidently viewed her as a young woman of good family who got entangled in narcotics traffic but after her arrest wholeheartedly and frankly cooperated to help convict appellant, "a large purveyor" (J.A. 102). Thus, although she was indicted jointly with appellant on all 15 counts, she pleaded guilty to count 1 above prior to trial (J.A. 23, 24) and after trial, because of her cooperation in prosecuting appellant, she was given a suspended sentence with parole on this single count. The remaining 14 counts were dismissed on motion of the Government with the trial judge's consent (J.A. 102).

In point of fact Floyd had been a narcotics user for a considerable time before she met appellant in the summer of 1954, and she continued to take heroin by syringe throughout and even after the period covered by the indictment (J.A. 13, 14). She testified at the trial that she knew no source of narcotics other than appellant (J.A. 18), although prior to meeting him barely a half year prior to the alleged events, she had secured narcotics from another friend of hers (J.A. 13).

It was Floyd, who first met Fialkewicz, and agreed to secure narcotics for him (See above, January 14 and 18). She evidently went to appellant, but there is no evidence that she told him why she needed drugs or that he knew that a third person (Fialkewicz) was involved until January 21st at

the earliest. It was she who made every contact with Fialkewicz and then turned to appellant, who was a personal friend of hers (J.A. 13). The following colloquy occurred when she was asked her motive in securing drugs for Fialkewicz (J.A. 22):

"Q. When you were engaged in delivering these items to the federal agents and receiving cash from them, what was your purpose in so doing?

"A. I thought the agent was addicted to narcotics at the time.

"Q. What was your personal motive?

"A. Well, if you mean if I received money for it, no.

"Q. Well, what was your reason?

"A. I felt sorry for the agent at the time.

"Q. And that is the only reason.....?

"A. Yes."

She said she had seen what happened to addicts "when they don't use it. It is hard to explain to someone who has never been involved in it.... Let us say it isn't very pleasant" (J.A. 22). Floyd denied that she herself had ever been an addict (J.A. 15), but the trial judge obviously considered that she had been one at the time covered by the indictment (J.A. 75).

Floyd denied that she expected leniency because of her testimony for the Government, but she was admittedly well aware of the fact that she had pleaded guilty to only one of 15 counts and that the rest were still pending. She distinguished between herself and appellant because he, not she, knew where to purchase heroin in a revealing statement (J.A. 24):

"A. I don't expect anything by testifying. But I am not going to say that it was myself that went and purchased narcotics; that I was dealing in narcotics. I wasn't. I did not have any supply of this. I am telling you what actually happened. Bill Greene will defend himself as I am trying to do."

The statement indicates that Floyd viewed appellant and herself as purchasers on Fialkewicz' behalf, the only differ-

ence being that he knew where to make the purchases for the agent and Floyd did not (See J.A. 13, however). However, as seen above, if any purchase occurred in connection with the events of January 14 and 18, it was by Floyd from appellant, and appellant, who might well have believed it was for Floyd's own use, certainly had no reason to know a third person (Fialkewicz) was involved. The subsequent events showed nothing to distinguish their respective roles, since the money evidently travelled directly from Fialkewicz through Floyd and, if she is to be believed, appellant to the source of supply. That is, if Floyd was not a purchaser, then neither was appellant. Rather they were both helping Fialkewicz, whom she alone knew and believed to be an addict, to make purchases.

The Judgment and Sentence of the court below are at J.A. 96, 97. See also J.A. 100, 101. Appellant was found "guilty as charged and convicted," that is, on all fifteen counts, and was sentenced to twenty months to five years plus \$500 fine on each count. The sentences and fines under counts 2, 4 and 7 were made consecutive, and the remaining sentences and fines were made concurrent with those three. "In other words the aggregate sentence is not less than five years and not more than fifteen years, and a \$1,500.00 fine" (J.A. 101).

STATUTES INVOLVED

The statutes allegedly violated are cited in footnote 1, above. They are 18 U.S.C. 371; 21 U.S.C. 174; 26 U.S.C. (1954) 4704(a); and 26 U.S.C. (1954) 4705(a). There is also fundamentally involved 35 Stat. 1152, as amended. 18 U.S.C. 2, hereafter referred to as "18 U.S.C. 2." These statutes are set out in their relevant parts in an Appendix to this brief.

STATEMENT OF POINTS

1. Appellant's conviction on all fifteen counts of the indictment constituted double punishment in the following respects:

A. Appellant's conviction under the conspiracy count barred his conviction under the substantive counts on grounds of double jeopardy and punishment.

B. Under counts 4, 5, 6 and 7, 8, 9, respectively, appellant was convicted twice for the same crimes.

C. Under counts 10, 11, 12 and 13, 14, 15, respectively, appellant was again convicted twice for the same crimes.

2. A. The trial court erred in admitting evidence of an accomplice's separate acts and statements since there was no prior independent proof that a conspiracy or other criminal concert existed between the accomplice and appellant.

B. The irrelevant testimony of agents Kelly and Jackson was erroneously and prejudicially admitted in evidence and submitted to the jury.

3. The trial court's charge to the jury contained numerous prejudicial errors:

A. In the instructions on the vital aider and abettor rule.

B. In the instructions on the credibility of a vital witness who was both an accomplice and an addict.

C. In the instructions concerning the effect of all three statutes allegedly violated.

D. In other specific respects and, in sum, in the charge as a whole.

SUMMARY OF ARGUMENT

I. If the Government's verdict against appellant under the 14 substantive counts can be sustained at all, it must be on the basis that appellant was properly tried and convicted of knowingly aiding and abetting (see 18 U.S.C. 2) or facilitating (see 21 U.S.C. 174) the efforts of the prosecution witness Barbara Floyd in a series of sales which she allegedly made to a disguised narcotics agent, Fialkewicz, during the month of January, 1955. (a) Of the multiple offenses charged under each of these counts, the indictment, the evidence and

the Government's own position all focus on selling as the specific offense for which appellant was tried and convicted in connection with Floyd's activities. (b) On the other hand, since Floyd first dealt with Fialkewicz entirely on her own; since only she had contact with him and only she was seen by federal agents with the heroin in her possession; and since there is no other evidence that appellant was her principal in fact, the only conceivable basis for sustaining his guilt on the basis of her acts is that he sought to promote Floyd's own venture and was therefore her aider and abettor, if Floyd was in fact a seller of heroin.

II.A. In view of this, since there was no separate evidence to show the existence of a conspiracy between appellant and Floyd, and the evidence of overt acts consisted solely of the evidence of the crimes charged in the 14 substantive counts, appellant's conviction under the conspiracy count (count 1) barred his conviction under those 14 counts (counts 2 to 15). When there is a necessary identity between the proof of conspiracy and the proof of a substantive crime, just as when the substantive crime inherently requires joint action, a defendant cannot be tried and convicted for both offenses. Whereas in Pereira v. United States, 34 U.S. 1, there was separate proof of conspiracy, in Krench v. United States (6th Cir.), 42 F.2d 354, and in Freeman v. United States (6th Cir.), 146 F.2d 978, there was not--just as there ^{was} ~~is~~ here--and the court invalidated the convictions for the substantive crimes as constituting double punishment. The Krench and Freeman cases are controlling here.

B. The evidence under counts 4 to 9 showed that on January 21, 1955, Fialkewicz gave Floyd money for the purchase of heroin, but that she could only secure part of the heroin that day and Fialkewicz was forced to wait two more days to receive the rest. If this was a sale it was one sale only and not two, just as one may deliver any purchased goods in two installments. Fialkewicz' offer to purchase was a single

impulse leading to only one criminal transaction. See Blockburger v. United States, 284 U.S. 299. Assuming that the transaction violated three separate provisions of the narcotics laws, appellant could be convicted for only three offenses, not six, and his conviction on all six counts was double punishment.

C. The evidence under counts 10 to 15 was similar in nature only it more dramatically shows the singleness of transaction in question. Fialkewicz paid his money to Floyd on the night of January 29, 1955, and received part of the purchased heroin at that time. The rest was given to him shortly after midnight. No new money was involved and therefore no new sale occurred. There were three violations at most, and appellant's conviction on six counts was double punishment.

III.A. It is elemental that an alleged co-conspirator's acts and statements are not admissible against the other defendant unless there has already been independent proof that a conspiracy between the two existed. While there was no such proof here, the court admitted in evidence against appellant a vast and highly prejudicial quantity of testimony, concerning the prosecution witness Floyd's own conduct while not in appellant's presence. Some of this was not even the best evidence, since Floyd failed to corroborate it. Perhaps the most harmful breach of the above rule was the evidence given at the outset of the trial of Floyd's initial two transactions with Fialkewicz. There was no evidence whatsoever that appellant knew of these meetings or of her initial decision to help Fialkewicz purchase heroin.

B. The government also introduced evidence by an agent named Kelly that in December, 1954, under an assumed name he had sought appellant out with a bogus letter of introduction from a jailed friend of the latter and had proposed that appellant secure narcotics which Kelly would sell to raise bail money for their "mutual" friend. If there was any deal

at all, it fell through. Another agent named Jackson corroborated Kelly in this evidence. If there was ever any deal proposed, it was an aborted one. While Floyd was seen twice by these agents in appellant's company (she was a friend of appellant's), there is not the faintest suggestion that she was involved in these negotiations. No crime was charged; entrapment was clearly involved; and the evidence had no relevance at all to the conspiracy count, under which it was offered. It was prejudicial error to admit this evidence over appellant's repeated objection, and compounded error for the judge to charge the jury that it tended to show appellant's "knowledge" (sic) of what went on between Floyd and Fialkewicz (an entirely different agent) a month later.

IV.A. The admissible evidence led reasonably and directly to the inference that Floyd had merely helped Fialkewicz purchase heroin, that her help consisted in receiving the money, enlisting appellant's help in finding a seller with a source of supply, and then delivering the heroin. None of this would support the charge that she with appellant's help was selling to Fialkewicz, which was the specific crime charged. See Moses v. United States (3rd Cir.), 220 F.2d 166. Any ~~any~~ evidence that appellant's role or motives differed from hers went only to the initial two sales when, in any event, he could not have known why Floyd--a user of heroin herself--needed the heroin, nor that Fialkewicz even existed. Despite this, as well as the major gaps and weakness inherent in the evidence as a whole, the trial judge virtually directed the jury to exclude the alternative of innocence and consider only that of guilt:

B. In explaining the aider and abettor rule, which was indispensable to the Government's case, the court wholly failed to state what crime appellant was accused of aiding and abetting; indeed, he failed to do so throughout his charge. He also charged the jury in effect that any help given Floyd in her dealings with Fialkewicz would establish

guilt, regardless of whether appellant or Floyd was seeking to promote Floyd's alleged "sales," as such. These instructions dispensed with any proof either of intent or of the specific offense charged, i.e. with the basic elements of criminal responsibility.

C. Floyd herself initiated and carried on the dealings with Fialkewicz and she brought appellant into them indirectly. She was his personal friend, and throughout the period in question she was also a heroin user and in the judge's view an addict. She had been a user before meeting appellant, in fact. At the time of the trial, while she had been indicted jointly with appellant on 15 counts, she had pleaded guilty to only one and had not yet been sentenced or informed of the fate of the remaining counts. She manifestly believed that her cooperation as the "complete" Government witness would result in leniency, and it did: she received a suspended sentence on one count alone and the Government dismissed the rest with the trial judge's sympathetic approval. Since she was an accomplice and an addict, under Fletcher v. United States, 81 U.S. App. D.C. 306, 158 F.2d 321 and Kelly v. United States, 90 U.S. App. D. C. 125, 194 F.2d 150, the judge was required to charge the jury that her testimony should be received with suspicion. He not only failed to do so, he omitted even to mention that she was an addict. In fact he gave the jury repeated and powerful encouragement to believe her testimony in its entirety and stated that she was corroborated by the testimony of a number of Government agents, whereas in fact in virtually every decisive respect she was not corroborated at all.

D. While in discussing the three statutes allegedly violated, the judge consistently failed to specify for the jury which of the multiple offenses named in those provisions appellant was alleged to have committed--namely, selling--he stressed the presumption which may arise under 21 U.S.C. 174 and 26 U.S.C. 4704(a) from proof of possession of the heroin.

Only Floyd had testified to such possession by appellant, and therefore the Government was not even entitled to the presumption under 26 U.S.C. 4704(a) which operates only against the person "found" in possession of narcotics by federal agents. In both cases, however, the judge unduly and erroneously emphasized that possession alone would support conviction, even though the alleged sales were carried out by Floyd after the heroin had left appellant's possession and while appellant was not present. The judge did not instruct the jury, however, on the alternative requirements of strict, full proof of all the elements under any of the statutes, and in the case of 26 U.S.C. 4705(a) he confusingly left the jury with the erroneous impression that proof of possession, without more, would also support conviction under that statute.

E. On the whole the charge was a continuous argument for conviction which excluded every hypothesis of innocence and minimized, if not ignored, every element of legal defense. Even "reasonable doubt" was treated in such a fashion as to violate the precepts laid down in Billeci v. United States, 87 U.S. App. D.C. 274, 184 F.2d 394, 24 ALR 2d 881. The judge also misstated uncontradicted facts, and the jury was led to believe they were legal instructions rather than mere advisory comment. He dwelt gratuitously and confusingly on the "purpose" of the narcotics laws, and he consistently revealed a pro-prosecution bias in the tone and content of his entire charge. In all this he committed manifold and irreparable error.

ARGUMENT

I. Appellant's Conviction Under Counts 2 To 15 Must Rest, If At All, On The Theory That He Aided And Abetted Floyd's Sale To Fialkewicz.

It is important at the outset to note that, so far as the substantive counts (2-15) are concerned, the judgment below must rest, if at all, on the theory that appellant aided and abetted or facilitated the sales which Floyd made to Fialkewicz in January, 1955. See 18 U.S.C. 2; 21 U.S.C. 174.^{4/}

(a) The Crime Charged Was Selling To Fialkewicz. Indeed we think this is obvious on the face of the indictment which jointly charged both appellant and Floyd. This is the only charge common to all 14 counts. As noted above, counts 4 to 6, 7 to 9, 10 to 12, and 13 to 15, respectively, refer to the same transaction, and the basic charge in each case (counts 4, 7, 10, and 13, respectively), is that defendants "did sell, barter, exchange and give away" heroin to Fialkewicz (J.A. 92-95). From the facts recited above it is obvious that insofar as any heroin was bartered, exchanged or given to Fialkewicz it was always in exchange for money, i.e. as part of a sale from someone to Fialkewicz. While companion counts charged that defendants "purchased, sold, dispensed and distributed" heroin (counts 5, 8, 11, and 14) and that they "facilitated the concealment and sale" of heroin (counts 2, 3, 6, 9, 12, and 15) in the nature of the case there was no evidence, nor could there have been, of either purchase^{5/} or

^{4/} 21 U.S.C. 174 specifically punishes one who "facilitates.... the concealment, or sale" of narcotics known to have been unlawfully imported. It is significant that the relevant counts of the indictment (counts 2, 3, 6, 9, 12, and 15) did not even charge defendant with actual sale but merely that he "facilitated the sale" of heroin (J.A. 92-95). Generally, throughout the brief we refer to the general question in terms of "aiding and abetting," for the sake of brevity.

^{5/} Specifically there was no evidence or basis for inference that heroin was purchased by appellant within the District of Columbia. See, e.g. Brightman v. United States (8th Cir.), 7 F.2d 532, and Hood v. United States (8th Cir.), 14 F.2d 925.

concealment and, again, if defendants dispensed or distributed heroin to Fialkewicz, they did so for money, i.e. in the course of a sale.

Undoubtedly, too, as was stated in United States v. Moses (3rd Cir.), 220 F.2d 166, 168, "the Government must select and identify the particular 'offense against the United States' in which the wrongdoer has participated..... Therefore, a participant must be punished either as a seller or as a buyer." See also Lambert v. United States (5th Cir.) 101 F.2d 960; Morei v. United States (6th Cir.), 127 F.2d 827. As seen, the Government chose to indict appellant as a seller, and in this Court it has defended the judgment below as resting on evidence of "sales" to Fialkewicz. See its September 5, 1956 "Opposition to Petitioner's Memorandum in Support of Leave to Prosecute Appeal in Forma Pauperis," Misc. Docket No. 638 of this Court (hereafter called the "September 5th Opposition") pp. 1, 2; also pp. 5, 10. Finally, as noted, the Government stated at the outset of the trial that the evidence of conspiracy and substantive offenses would be the same except for the testimony of agents Kelly and Jackson (R. 18, 19). Since 21 of the 22 overt acts under count 1 related to the alleged sales by Floyd to Fialkewicz, this was tantamount to election, required under the Moses case, supra, to treat appellant as a seller.

(b) Appellant Was Guilty, If At All, As An Aider And Abettor To Floyd. It has been shown that the Government agents never saw either heroin or money paid for heroin in appellant's possession, nor did they have any conversation or other direct dealings with him during the course of their January, 1955, transactions with Floyd. Indeed, apparently neither even knew of the other's existence prior to January 21, 1955, i.e. after two transactions had already occurred. See Statement of the Case, above. While Fialkewicz testified that subsequently during a conversation with appellant on February 2nd, the latter stated that Floyd had delivered for him (J.A. 62),

even this vague remark was not connected with any specific transaction and could have made appellant no more than a procurer or accessory under 18 U.S.C. 2, assuming the sales were proven. We repeat too that Floyd acted entirely on her own during the first two transaction which set the pattern for the rest (J.A. 1-4). As to the remaining transactions, Fialkewicz always contacted her, made the arrangements with her, and met her; there is no evidence that appellant was the actual seller--if these were in fact sales (J.A. 4-11, 45-51, 54-57).

Thus, the evidence under the substantive counts at best might have shown that appellant aided and abetted, or facilitated, the alleged sales by Floyd to Fialkewicz^{6/}, that is, that he associated himself with her in these "ventures" and wished to bring them about. See United States v. Moses, supra, 220 F.2d 166, 168; Nye & Nissen v. United States, 336 U.S. 613, 619; United States v. Peoni (2nd Cir.), 100 F2d 401, 402. It is on this basis, if at all, the judgment below must be sustained.

II. Appellant Was Subjected To Double Jeopardy And Punishment.

A. Appellant's Conviction Under Count 1 Barred His Conviction Under The Substantive Counts, Since There Was A Necessary Identity Of Evidence Under Those Counts.

Of the 22 "overt acts" alleged in support of the conspiracy charge in count 1 of the indictment (J.A. 89-91), all except the 22nd--which was not an overt act in any event^{7/}--

^{6/} Indeed, the trial judge told the jury that the aider and abettor rule was "very important," (J.A. 85) although he erroneously failed to state that it was in fact indispensable.

^{7/} Indeed, throughout this "overt act" relating to the meeting between Fialkewicz and appellant on February 2nd, even according to Fialkewicz, appellant acted entirely on his own (J.A. 61-63). It provided no "manifestation that the conspiracy is at work." United States v. Offutt, 75 U.S. App. D.C. 344, 348; 127 F.2d 336, 340. In fact, the trial judge charged the jury that the evidence of this incident as well as the testimony of agents Kelly and Jackson were "to show the defendant Greene's knowledge of what was going on" (J.A. 85). The latter testimony was improperly omitted even for that purpose. See III B, below; but in any event neither incident supported the conspiracy charge.

concerned acts by Floyd and appellant done in the presence of the agents or else alleged statements by Floyd to the agents. As for the latter there was no proof in support of paragraphs 2, 4 and 18, which did not allege "overt acts" in any event, nor in support of paragraph 14.

Moreover, these and other separate acts and statements by Floyd were not admissible against appellant unless and until either a conspiracy or his knowing purpose to promote Floyd's alleged sales to Fialkewicz had been established by independent prior evidence. There was no such evidence. See IIIA below. In short, such proof as there was of overt acts consisted entirely of the evidence relating to the substantive transactions themselves, and more particularly to the allegedly joint conduct of appellant and Floyd. Such proof as there was of conspiracy, or "partnership in criminal purposes" (United States v. Kissel, 218 U.S. 601, 608) consisted of precisely the same evidence--given almost entirely by Floyd (see also J.A. 61-63)--as was essential to show any criminal knowledge or purpose on appellant's part as her alleged aider and abettor under the substantive counts. Since there was a necessary identity of evidence in both respects, the crimes charged were truly identical and appellant's conviction under count 1 barred his conviction for substantive crimes.

It may be conceded at once that there is no intrinsic bar to simultaneous prosecution for conspiracy and substantive crimes alleged as overt acts, provided the jury is properly instructed on that theory. Pinkerton v. United States, 328 U.S. 640 explained in Nye & Nissen v. United States, 336 U.S. 613, 618, 621. Similarly, there is no bar where the prosecution proceeds under the substantive counts on the aider and abettor theory, provided there is either independent evidence of the commission of each type of offense, Nye & Nissen, supra, or independent evidence of the conspiracy agreement itself, as there was in Pereira v. United States, 347 U.S. 1.

Here neither requirement was met. The above cases do not authorize simultaneous conviction where, as here, there is a necessary identity in the Government's proof (cf. Sims v. Rives, 66 App. D.C. 24, 84 F.2d 871, cert. denied, 298 U.S. 682) anymore than where the crime itself inherently requires concerted action. See, e.g. Katz v. United States, 271 U.S. 354; Pinkerton v. United States, supra, 328 U.S. 641, 643.^{8/}

Twice in similar circumstances the Sixth Circuit Court of Appeals has held that there was double punishment, in Krench v. United States (6th Cir.), 42 F.2d 356; and Freeman v. United States (6th Cir.), 146 F.2d 978. In Krench the error consisted in defendant's simultaneous conviction both for conspiracy to import merchandise unlawfully and for the actual importation itself, where the evidence showed at most that defendant had procured or aided and abetted its importation by others. The court noted too that the evidence might have sustained the conspiracy but not the substantive charge, as is the case here too.

Freeman v. United States, supra, provides an even more striking parallel, for there the charged offenses also related to the narcotics laws, and consisted of two substantive counts alleging separate sales and third charging conspiracy. The court noted at the outset, as stated above, that where a crime intrinsically requires joint action, conspiracy cannot also be charged. Although the substantive offenses were not of that nature, it held that the proof itself necessarily was and thus there was double jeopardy.

"There can be no doubt that the substantive offenses charged in the two counts required proof of joint action, just as it was required under the third (i.e., conspiracy) count."
Id. 146 F.2d 978, 979

^{8/} Apart from the aider and abettor rule, the result would still be the same, since if appellant was guilty of sales to Fialkewicz he was a participant in a joint crime with Floyd. See United States v. Rosenblum (7th Cir.), 176 F.2d 321, 330, concurring opinion of Major C. J. See also J.A. 86. In purportedly instructing the jury on the aider and abettor rule, the trial judge actually seemed to adopt this view in part.

That is equally the case under the substantive counts here.

The Freeman case also anticipates any argument based on the fact that count 1 alleged multiple sales under the conspiracy, proof of any one of which would support conviction. (c.f. Moss v. United States (6th Cir.), 132 F.2d 875, distinguished in Freeman, supra, 146 F.2d 978, 980). The same was true in Freeman, but it did not save the day there, since the only overt acts shown were also alleged substantive offenses and proof of the latter would duplicate the proof required to show conspiracy. That is the case here, as stated above. Moreover, to accept such an argument would place on appellant the burden of surplusage in the Government's proof of a single alleged conspiracy, and permit the fractionation of that conspiracy into 14 purely theoretical lesser ones. See, however, United States v. Cohen (3rd Cir.), 197 F.2d 26, 29.

A similar question was noted, but not decided by this Court in Aikens v. United States, U.S. App. D. C. 232 F.2d 66, 67, because appellant had failed to move in the trial court to compel the Government to elect among its counts, and because the error was held to have been harmless in any event. Although here, too, appellant's trial counsel failed to make such a motion, in view of the complexity and multiplicity of the indictment, the trial judge's expressed reluctance to hear any argument at the close of the Government's case, and the extreme unlikelihood that he would have granted such a motion (see J.A. 75), the omission was neither unjustified nor conceivably decisive. Since the error was obviously substantial and, we believe, plain, appellant urges an exception. See F.R. Crim. P. 52(b); Crawford v. United States, 91 U.S. App. D. C. 234, 237, 198 F.2d 976, 979.

In sum, we submit that appellant's conviction under count 1 necessarily barred his conviction under the substantive counts (2-15). Indeed, in purportedly charging the

jury under the aider and abettor theory, the trial judge revealingly and understandably adopted language more accurately describing conspiracy (J.A. 86).

B. Under Counts 4 And 7; 5 And 8;
6 And 9, Respectively, Appellant
Was Convicted Twice For The Same
Alleged Offense.

The evidence showed that on January 21, 1955, Floyd received \$100 from Fialkewicz for the purchase of heroin capsules; that she delivered part of those capsules to him that night; intended to deliver the remainder that night, but could not secure them; and that after two abortive meetings she finally turned over the "remainder" (J.A. 7) of the purchased capsules on January 23rd. (J.A. 4-8, 45-51). On the basis of this continuing transaction appellant was indicted and convicted on six counts, three for each date. Yet, assuming that these events constituted selling to Fialkewicz and that appellant's culpability was proven, only one sale was proven, or indeed alleged (J.A. 89, 90). The impulse--Fialkewicz' offer to purchase--was single. Therefore only one crime could have occurred under each statute. See Blockburger v. United States, 284 U.S. 299; and Bramblett v. United States, 97 U.S. App. D. C. 330, 231 F.2d 489, cert. denied, 348 U.S. 403. Appellant's conviction under counts 4 to 6 barred his conviction under counts 7 to 9.

Previously, in its September 5th Opposition (p. 3) the Government argued that the crime was delivery, not sale, and that there were two separate deliveries. Elsewhere in that Opposition (pp. 1, 2) it repeatedly referred to the evidence as proving "sales" and we have previously shown that in fact this was the crime alleged and proven, if any was proven at all. See I above. The contention does not square with the facts.

Neither does it square with the law. Of course, if delivery were the offense under each act, appellant might have been indicted 201 times for this transaction alone, i.e., three times for each capsule. The argument leads not only

to absurdity but to the barrier of Bell v. United States, 349 U.S. 81. See also Rayborn v. United States (6th Cir.), 234 F.2d 368, 371. Here no more than in the Bell case, do the statutes support such a construction.

C. Again Under Counts 10 And 13;
11 And 14; 12 And 15, Respectively,
Appellant Was Convicted Twice For
The Same Alleged Offense.

Here the evidence showed that on January 29, 1955, Floyd received \$80 from Fialkewicz for the purchase of heroin capsules and simultaneously gave him part of the capsules, arranging to deliver the "remaining" capsules (J.A. 57) later that night; that when final delivery was made it was shortly after midnight, early in the morning of January 30th (J.A. 10, 11, 57-59). The two deliveries were so closely tied together that Fialkewicz mailed all the capsules to the Government chemist in one envelope (J.A. 60, 61).

Here the evidence shows even more dramatically the integrity of the transaction. It should go without saying that the fortuitous intervening stroke of midnight did not mark the start of a new sale. For the rest, we adopt the remarks in IIB above; they apply equally here.

III. The Erroneous And Prejudicial Admission Of Certain Evidence

A. There Was No Basis For The Admission
Of Evidence Of Floyd's Separate Acts
And Declarations Which Constituted
The Bulk Of The Evidence.

Agents Fialkewicz and Tremoglie together with Floyd herself testified to a large number of declarations and acts by Floyd made or done in the presence of the agents but not in the presence of appellant. These included, with one exception (J.A. 3), the entire events of January 14 and 18 as well as a number of meetings and conversations between Floyd and the agents on subsequent occasions. Insofar as the agents'

testimony was not corroborated by Floyd (e.g., J.A. 56,^{9/} 57), it was not even the best evidence of the alleged facts. However, far more serious was the admission of such testimony when there was no prior independent proof that a conspiracy existed between appellant and Floyd extending to the commission of the offenses charged.^{10/} In this respect the evidence under counts 2 and 3 stands out only as the initial and most obvious infringement of appellant's rights. Her acts could not bind him unless a conspiracy was shown to be already in existence. Here, too, counsel for appellant failed to object to the introduction of this evidence, but because of the trial judge's peremptory dismissal of counsel's other objections (e.g., J.A. 75, 86-88), including his refusal even to exclude the testimony of agents Kelly and Jackson (J.A. 37, 38, 88), the omission was purely formal, while the prejudicial effect was plain and serious indeed.

In its opinion in May v. United States, 84 U.S. App. D.C. 233, 247, 175 F.2d 994, 1008, cert. denied, 338 U.S. 830, this Court stated that the acts and declarations of an alleged co-conspirator are not admissible to establish the guilt of the other defendant unless and until "(a) the conspiracy has been established and (b) the defendant's participation in the conspiracy has been established."

^{9/} At one point Fialkewicz testified that at a meeting with Floyd on January 29, 1955, while standing near appellant's automobile he heard Floyd say "You are putting me out in front and I am doing your work for you" (J.A. 56). Fialkewicz failed to show that he was in a position to hear any response by appellant or whether there was any response. So far as Fialkewicz, the witness, was concerned this statement was made in appellant's absence, therefore. Moreover, Floyd failed to corroborate, much less explain this isolated, ambiguous, but unquestionably damaging statement which the judge specifically quoted in his charge (J.A. 84).

^{10/} In view of the prior contention (IIA above) that the evidence to support the conspiracy and substantive offenses was identical, we do not press the point of the judge's failure to instruct the jury that such evidence, even if admissible to show the conspiracy was not necessarily admissible to show the latter. However, if that contention were mistaken, his failure to give such instructions would be a serious error.

No evidence whatever was offered to establish a conspiracy between appellant and Floyd covering the initial events of January 14 and 18(overt acts 1-5, J.A. 89. See J.A. 1-4). Floyd's later testimony did not have the retro-active effect of tying in these earlier events, of course. As to the subsequent incidents between herself and the agents, she testified that throughout she acted solely out of sympathy for Fialkewicz as a purported addict (J.A. 22) and that appellant, who presumably acted from the same motive, made the purchases. This evidence not only raised a strong inference of entrapment,^{11/} but assuming it implied tacit agreement between the two, it was not the same agreement or partnership in criminal purposes (United States v. Kissel, supra, 218 U.S. 601, 608) which was charged in the indictment. See I(a), above.

We emphasize purposes because the Government's selection of the offense or overt act "makes a difference" in terms of the motive and role as buyer or seller of a defendant accused under the narcotics law. United States v. Moses (3rd Cir.) 220 F.2d 166, 168. See also Adams v. United States (5th Cir.), 220 F.2d 297; United States v. Sawyer (3rd Cir.), 210 F.2d 169; Morel v. United States (6th Cir.), 127 F.2d 827. Since Fialkewicz played on Floyd's sympathy and Floyd in turn sought help from appellant as her friend--and there is no evidence of personal profit, etc., to show that it was otherwise--the conspiracy charged was not proven. On the other hand, assuming for argument that appellant's motives did in fact differ from Floyd's uncontradicted ones, there was still no "partnership in criminal purposes" and no conspiracy.

In either event Floyd's separate acts and declarations were not admissible against appellant, since conspiracy had not been previously and independently established. The submission of such evidence to the jury had the inherently con-

^{11/} Of course, the defense of entrapment was not raised in the court below and therefore we do raise the point independently here.

fusing and harmful effect noted by Justice Jackson, concurring in United States v. Krulewitch, 336 U.S. 440, 453:

"As a practical matter, the accused is often confronted with a hodgepodge of acts and statements by others which he may never have authorized or intended or even known about, but which help to persuade the jury of the existence of the conspiracy itself. In other words, a conspiracy often is proved by evidence that is admissible only upon assumption that conspiracy existed."

Since appellant alone was on trial the admission of this evidence was error without regard to any protective instructions that might have been given. There were none in any event (see f.n. 10, above and IV, below).

B. The Testimony Of Agents Kelly And Jackson Was Irrelevant And Irreparably Harmful.

This evidence has been fully recited above, in the Statement of the Case.^{12/} It had an even stronger aura of entrapment than the principal events, since it was entirely premised upon a ruse by Kelly to bring into play appellant's sympathy for a friend named Krimer, supposedly also a friend of Kelly (J.A. 30, 31). Cf. United States v. Sherman (2nd Cir.) 200 F.2d 680; United States v. Masciale (2nd Cir.) 236 F.2d 601. The issue of entrapment itself is not presented, of course, because no criminal charge arose of this testimony, but certainly the evidence did not show any independent design by appellant to sell narcotics.

Yet the evidence was introduced solely in support of the conspiracy charge (R. 19) and the trial judge charged the

^{12/} During his testimony Kelly stated that he had told appellant that he knew the latter was a narcotics "connection" (J.A. 32). Counsel objected to this purely self-serving testimony (J.A. 32, 33) and at the end of Kelly's testimony he renewed his objection on this ground as well as the ground that the entire testimony was irrelevant (J.A. 36-38). These objections were overruled. However, on the whole, this statement by Kelly, requiring an objection in the jury's presence, merely aggravated the greater prejudice to appellant from Kelly's and Jackson's entire testimony.

jury in effect that it tended to show "the defendant Greene's knowledge of what was going on" (J.A. 85) a month later between Floyd and Fialkewicz. The bare statement of its supposed intendment shows how utterly irrelevant this evidence was. There was not one jot of evidence to show that Floyd's presence at two of appellant's meetings with Kelly and Jackson was related to the alleged aborted transaction between them and appellant.

Since this was the sole theory on which the evidence was submitted to the jury, it is sufficient to point out that from the evidence of Floyd's innocent presence at two of these meetings with Kelly and Jackson, appellant could not conceivably have reasoned that her subsequent self-initiated meetings with Fialkewicz were for the purpose of helping the latter secure heroin. See, e.g. 2 Wigmore, Evidence (3rd Ed. 1940), sec. 301.^{13/}

On the other hand, the evidence was undoubtedly prejudicial, particularly so because in his comments to the jury (J.A. 85) the trial judge omitted any reference to the sympathy ruse with which Kelly had approached appellant. The evidence and the charge, inevitably tended to give the jury the unwarranted impression, in considering the evidence of Floyd's January activities, that appellant was an experienced seller, a "connection" (J.A. 32) who "knew what was going on" (J.A. 85). Thus 'informed' it could easily gloss the major gaps and weaknesses in the Government's evidence relating to appellant's part in the alleged sales themselves; conclude,

^{13/} Assuming that the evidence was introduced to show intent or design, as opposed to knowledge, it was equally incompetent for those purposes. Compare, e.g. Harper v. United States, U.S. App. D.C. , F.2d , No. 13, 157, November 21, 1956, slip opinion pp. 3, 4, f.n. 2, 3; Fairbanks v. United States, 96 U.S. App. D.C. 345, 226 F.2d 251; 2 Wigmore, op. cit., secs. 302, 304, 368. Of course, there was no evidence of joint action or tacit agreement between Floyd and appellant throughout this testimony, so it was not competent to show a preexisting conspiracy of any sort.

as the judge did himself (J.A. 102), that Floyd was merely appellant's front or delivery girl, despite major uncontradicted evidence to the contrary; and accept her strange role as a 'smaller fish' being cast back to catch a larger one.

Counsel for appellant twice protested the admission of this testimony and its submission to the jury and was twice overruled (J.A. 37, 38, 88) to appellant's inescapable and serious prejudice. These rulings constituted irreparable error, for the reasons stated above.

IV. Errors In The Charge To The Jury

A. These Errors Were Not Harmless. The Charge Virtually Amounted To A Direction To Convict Appellant, Although The Evidence Raised Major Doubts As To His Guilt.

Obviously Floyd's testimony was essential to appellant's conviction, since mere presence at the scene of a crime does not establish guilt and only she could give criminal color to his conduct (See J.A. 101, 102). She was the complete witness, the trial judge said (J.A. 75), and the indispensable one (J.A. 102). He apparently believed that appellant's guilt or innocence depended entirely on whether the jury believed or disbelieved her testimony in toto (J.A. 75):

"Actually I think they have to believe all or none of Barbara Floyd's testimony, and I left the entire issue of credibility of witnesses to the jury." (J.A. 87)

We discuss below how inadequately and unfairly he treated the issue of Floyd's credibility. The point here, however, is that his 'all-or-none' assumption was entirely unwarranted.

Appellant's conviction as her aider and abettor necessarily presupposed that Floyd herself, the principal, was guilty of the alleged sales to Fialkewicz, whether formally convicted

or not. ^{14/} See, e.g. Karrell v. United States (9th Cir.), 181 F.2d 981, cert. denied, 340 U.S. 891. Similarly, there was nothing to set appellant's motives apart from Floyd's. She was his personal friend. She met Fialkewicz and decided to help him. Initially appellant might have believed Floyd wanted the narcotics for her own use; on one occasion she gave Fialkewicz capsules which she "had had" (J.A. 4) in her own home for an indeterminate time. Even if appellant was disabused of this belief later, it is a reasonable inference--absent contrary evidence--that she explained her conduct to him as she did to the jury, i.e., as one who responded to a supposed addict's plea to help him secure narcotics (J.A. 22). The evidence strongly implies that neither Floyd nor appellant retained any of the advanced purchase money, but merely passed it on--she to appellant and appellant to someone unknown--to the true seller. Floyd herself characterized appellant as a purchaser although she denied that she was herself (J.A. 24). In truth, since nothing distinguished their motives or roles as links in Fialkewicz' chain to a seller, the logical inference was that neither was a purchaser, but both merely aided the disguised agent to make his own purchases. All of this emerges from the facts, as recited in the Statement of the Case, above, even assuming Floyd was believed:

The question is not whether the jury should have acquitted appellant, but whether it was fairly and properly instructed in the light of this evidence. We submit that it was not in

^{14/} Her decision to cooperate with the Government and plead guilty to count 1 alone did not establish her guilt without actual proof. Just as her formal conviction was not a prerequisite to appellant's own conviction, Beauchamp v. United States (6th Cir.), 154 F.2d 413, cert. denied 329 U.S. 723, her decision to plead guilty on the advice of her attorney (J.A. 24, 25) was not conclusive upon him.

numerous respects, and that the charge as a whole virtually dictated appellant's conviction, without regard to the evidence and the reasonable doubts naturally arising from it. We turn therefore to the charge itself.

B. Instructions On The Aider And
Abettor Theory

The trial judge recognized that this rule of law was "very important" (J.A. 85). Although it was not cited in the indictment, it was indeed indispensable to the Government's case under the 14 substantive counts. See I(b), above. The judge charged the jury on this question as follows (J.A. 85, 86):

"The Government does not have to show that the defendant Greene actually handled the narcotics, or that he actually sold or delivered any of the narcotics. The law is that any person who aids or abets or assists another in committing a criminal offense may be charged as a principal in that offense. If several persons act jointly or in concert and each performs a part that results in the commission of the offense, then all are equally guilty. For example, if a person drives an automobile to the place where the offense is committed, in order to enable the commission of the offense, and he knows the purpose for which he is driving the car, he is guilty of the offense, to the same extent as the person who actually commits the offense. Or if he performs some other part that leads to the commission of the offense by another, he is equally guilty with that other."

This was the entire reference to this vital question. The implicitly pro-prosecution tone and content of the instruction is obvious at once, as is the previously noted fact that the language used is more appropriate to the definition of conspiracy than the principal-assessory relationship. See II A and f.n. 10, above.

The instruction as a whole was not only inadequate in the circumstances, but erroneous as a matter of law. Here as well as elsewhere the judge failed to specify and define the specific offenses charged, although he generally implied that it was either 'selling or delivering'. Yet appellant's guilt even as an aider and abettor required proof that he knowingly promoted a sale to Fialkewicz. See I, above; United States v. Moses (3rd Cir), 220 F.2d 166, and cases cited therein.

Further, the Court gave the jury the unmistakable impression that the mere performance by appellant of "some other part that leads to the commission of a crime by another" is sufficient to support conviction. That is not the law; there must also be knowledge of the consequences intended by the principal (Floyd) and a purpose to promote them. Peoni v. United States (2nd Cir.), 100 F.2d 401; Morei v. United States (6th Cir.), 127 F.2d 827. While the judge briefly referred to the element of scienter in a specific pointed example, he never mentioned the second requirement.

This last omission was vital. If appellant did not share Floyd's purposes, or if he did and her innocent purpose was not to sell, but to help Fialkewicz buy from others, in either event he could not be guilty under the aider and abettor rule. Thus, it would not support guilt to prove that appellant helped Floyd as a personal friend to secure heroin supposedly for her own use or for whatever other purpose she might privately entertain unbeknownst to him (United States v. Moses, supra; Adams v. United States (5th Cir.), 220 F.2d 297), or that he secured heroin for her with no more than a general expectation that she might subsequently sell it to others unknown to him (Peoni v. United States, supra; Ventimigliano v. United States (6th Cir.), 61 F.2d 619). These propositions have particular reference to counts 2 and 3.

Moreover, contrary to the quoted instruction, it would not support conviction on the charge of selling to show that appellant joined Floyd in helping Fialkewicz to make purchases from some third party whom appellant knew (Adams v. United States, supra; Sawyer v. United States (3rd Cir.), 210 F.2d 297; Morei v. United States, supra; Lambert v. United States (5th Cir.), 101 F.2d 960). Yet, this was the natural thrust

of Floyd's testimony.^{15/} Just as appellant's guilt could derive from Floyd's guilt, so could his innocence derive from her innocence of the offense charged.

The fundamental vice of the quoted instruction--a vice seen throughout the charge--was the utter failure to state the law fully and adequately so as to comprehend the alternatives of innocence as well as guilt. It was an unrelieved argument in support of the Government's theory, as fully as a prosecution brief would have been. Moreover, since proof of aiding and abetting must be clear, not equivocal (Direct Sales Co. v. United States, 319 U.S. 703) the failure here, as elsewhere, to point up the requirements that criminal intent be shown and that the jury be satisfied beyond a reasonable doubt was particularly harmful (See also IV E, below).

C. Instructions On Floyd's Credibility

Floyd's testimony was not only essential to show any criminal intent or appellant's part in connection with her sales, it was the only evidence of his possession of the heroin--the 'key' to the statutory presumptions so heavily emphasized in the charge (See J.A. 82, 83; also J.A. 75).

Floyd was far more than the ordinary partner in crime who "turns state's evidence" in the hope of leniency. Not only had she a record of narcotics use over a long period of time, but she had previously consorted with at least one other man who had supplied her with narcotics (J.A. 16, 17). She also made the initial contact with Fialkewicz and dealt with

^{15/} Even the statutory presumptions arising from possession of the narcotics under 21 U.S.C. 174, and 26 U.S.C. 4704(a), as the trial judge elsewhere told the jury, may be overcome "if the defendant either by himself or by some other witnesses explains the possession of the drug to your satisfaction" (J.A. 82). Floyd's own explanation would meet this requirement and it extended equally to appellant as her accessory.

him on two occasions without appellant's knowledge. While she denied that she was testifying with any hope of leniency (at the time of the trial she had not been sentenced on her guilty plea under count 1 and the other 14 counts remained pending), it is hardly creditable that she did not hope to be rewarded for her role at the trial by a light sentence. And while she denied that she had ever been an addict, the trial judge plainly considered that she had been one at the time of the events alleged in the indictment (J.A. 75).

In view of the foregoing, it is at least remarkable that he readily assumed on the assurance of her attorney (J.A. 101) that she was merely a front or dupe for appellant as a "large purveyor" (J.A. 102). Because of this view and her cooperation with the prosecution he made an avowed exception to his normal treatment of similar offenders, gave her a suspended sentence on count 1 alone, and on the Government's motion dismissed the remaining 14 counts. His instructions as to her credibility evidently reflect the same assumptions as to Floyd's role.

In our view, it is hardly necessary to consider whether Floyd, who had gotten narcotics from other, perjured herself in testifying that she knew of no source of supply except appellant (Compare J.A. 13 and 18) for she was concededly an addict and an accomplice testifying in her own interest, i.e. in hope of leniency. In short, she was exactly the sort of person that this court has described as "inherently a perjurer" (Fletcher v. United States, 81 U.S. App. D.C. 306, 307, 158 F.2d 321, 322; see also Kelly v. United States, 90 U.S. App. D.C. 125, 127, 194 F.2d 150, 152). It has also said that the jury must be instructed that such a person's testimony "should be received with suspicion and acted upon with caution." (Fletcher v. United States, and Kelly v.

United States, loc. cit. Emphasis supplied.) The trial judge refused to give the jury this required charge.^{16/} His entire instructions on the credibility of Floyd, "the complete witness here" (J.A. 75), were as follows:

"The witnesses in this case are, first, the co-defendant Barbara Floyd, and, second, a number of Government narcotic agents. The witness Barbara Floyd, on her own testimony, is what is known in the law as an accomplice. The law requires me to state to you that the testimony of an accomplice should be received with care and scrutinized with caution. That does not mean that you should not believe an accomplice's testimony. All it means is that first you receive it with care and scrutinize it with caution; and if after having done so you decide to believe it, you have a right to act upon it. The degree of credibility which should be given to such testimony is a matter exclusively within the province of the jury, and you have a right, if you choose to do so, to accept the testimony of an accomplice. In fact, under our law, the jury has a right to convict a person on the sole, uncorroborated testimony of an accomplice, if the jury believes the accomplice. Here, however, you are not asked to do so because the Government has introduced corroborating testimony from a number of Government agents. But under the law an accomplice in the commission of a crime is a competent witness."

(J.A. 79. Underscoring supplied.)

To say that these instructions were grudgingly given and less than fair is mild, indeed. Initially the failure to warn the jury to receive Floyd's testimony with "suspicion" rather than mere "care" was error, of course. Thereafter the court proceeded to give virtually every conceivable form of encouragement to ignore even this inadequate suggestion.^{17/} He

^{16/} J.A. 75, 76. While the request for instruction (J.A. 95) was phrased in terms of this Court's holding that a person such as Floyd is an "inherent perjurer", the judge reread Fletcher himself and also refused to charge the jury in the terms laid down in that case and reaffirmed in Kelly v. United States, loc. cit., text, above, as a rule for this jurisdiction, viz. that her testimony should be received with "suspicion." His stated reason was that "the Fletcher case involved an informer who was also an addict..... Here the witness Floyd was not an informer...." (J.A. 76). However, the crucial holding in Fletcher, as explained and repeated in Kelly, is that a "drug addict testifying in his own interest is inherently a perjurer where his own interests are concerned." Obviously Floyd's own interests were vitally involved in her testimony, and it would be absurd to suggest that the hoped-for leniency was not a vital interest. Realistically, it was far greater reward than the normal hire of an informer. However, in view of the Kelly case, the fact that Floyd was an accomplice was merely an extra reason for suspicion, addiction alone was enough.

^{17/} Here, too, the pervasive pro-Government bias of the entire charge is evident in the underscored portions of the quoted instructions. See IV A, above and IV E, below.

omitted to mention that Floyd was an addict, as he had specifically agreed to do, at counsel's request (J.A. 76). Then he instructed the jury that corroboration of Floyd's testimony was not necessary. The Fletcher case, loc. cit., specifically holds that it was vital, unless the stronger warning referred to above is given. Both requirements could not be discarded without error.

Finally, the jury was instructed that there was corroboration of Floyd "from a number of Government agents. This simply was not so in any vital sense, as we have repeatedly shown above. A pointed instance is the fact that no agent had ever seen the heroin capsules in appellant's possession; another is the utter lack of corroboration of her testimony purportedly involving appellant in the events of January 14 and 18. But see the Statement of the Case, above.

Such corroboration as the agents gave, with a single dubious exception, was corroboration of the non-essential or purely self-incriminating aspects of her testimony. Moreover, the self-interested Floyd was aware of this fact (J.A. 22, 23). In terms of the Fletcher decision this is particularly decisive with respect to her testimony that the heroin capsules had been in appellant's possession, for the Government relied on presumptions arising from such possession in connection with 10 of the 14 substantive counts, and the judge heavily (erroneously, we think) stressed that conviction under these counts could rest on possession alone (J.A. 82, 83). Therefore we consider next this aspect of the charge.

D. Instructions Concerning The Statutory Presumptions.

(1) 21 U.S.C. 174 (counts 2, 3, 6, 9, 12, and 15) states in pertinent part as follows:

"Whenever on trial for a violation of this subdivision the defendant is shown to have or have had possession of the narcotic drug, such possession shall be deemed sufficient evidence to authorize conviction unless the defendant explains the possession to the satisfaction of the jury."

In connection with count 2 (and, by reference, the remaining five counts charging violation of this law) the judge explained this provision in the following terms:

"And the law proceeds further and provides that the Government does not have to prove every element of the offenses enumerated, but all that the Government has to show is that the defendant had possession of the narcotic drug. The law further provides that such possession shall be deemed sufficient evidence to authorize conviction, unless the defendant explains his possession of the drug to the satisfaction of the jury.

"In other words, if you find that the defendant had possession of this narcotic drug, in the District of Columbia, then from that fact alone you are at liberty to find the defendant guilty of a violation of the statute without anything more, unless the defendant by himself or by some other witnesses explains the possession of the drug to your satisfaction." (J.A. 82)

The then noted Floyd's testimony that on January 14, 1955, she had received 17 capsules from appellant which she in turn turned over to Fialkewicz who had given her the money "with which to procure them from Greene" (Id), and concluded:

"You have a right, if you believe this testimony, to find the defendant Greene has (should be 'had') possession of the 17 capsules which Fialkewicz testified he received through Barbara Floyd; and on the basis of this finding, without anything more, you have a right, as I have indicated to you, to find the defendant guilty under that count." (Id. Underscoring supplied.)

The judge's specific comments illuminate the general instruction previously quoted. Of course, there was the initial failure to describe the crime charged as sale to Fialkewicz. Next he glibly implied that Fialkewicz set out to purchase from appellant through Floyd. There was no evidence whatsoever that he intended to deal with anyone but Floyd. Even on February 2nd the agent sought to reach her, not appellant (J.A. 62). The judge also stressed to the jury that it could find appellant guilty "without anything more" than proof of past possession although under this count, as well as count 3, there was no evidence that appellant knew of Floyd's purpose in securing narcotics from him--assuming she did secure them from him. Finally, he ignored her explanation of her conduct which presumably explained appellant's conduct as well. Previously, the judge had noted that even possession could be

explained. Here he virtually implied it could not.

Apart from these errors we submit that the scope of the presumption itself was erroneously construed, and this was crucial. It became irrelevant whether, under subsequent counts there might have been sufficient evidence to convict appellant, absent the presumption or restricting it to the fact of unlawful importation, for the judge never instructed the jury on any alternative theory.

The presumption itself extends only so far as there is a "rational connection between the fact proved and the ultimate fact presumed." Yee Hem v. United States, 268 U.S. 178, 183; Casey v. United States, 276 U.S. 413, 418. Thus, proof of possession creates a presumption that defendant knew that the prohibited drugs were unlawfully imported, and that he purchased, bought, or received them from someone else, since they cannot be grown or produced in this country (Id.). It supplies no rational inference that appellant somehow is responsible for a subsequent sale carried out between third parties, in his absence or beyond his hearing. Under similar circumstances Judge Learned Hand noted the illogic of such an inference, in United States v. Peoni (2nd Cir.) 100 F.2d 401, 402, 403.

When this fallacy in the charge is added to Floyd's own dubious role and the instructions as to her credibility, we think that to uphold his conviction on the basis sanctioned by the trial court is indeed to pile inference on doubtful testimony. Compare Maynard v. United States, 94 U.S. App. D.C. 347, 215 F.2d 336. In Fletcher v. United States, supra, 81 U.S. App. D.C. 306, 158 F.2d 321, this Court stressed the need for extrinsic corroboration of a doubtful witness, i.e. some objective check on the accusing testimony as to her movements immediately before and after meeting the defendant allegedly to receive narcotics. Here, as well as in Fletcher, the prosecution's case showed the same defect. There was no specific extrinsic proof that she hadnot lied in vital res-

18/

pects in describing her separate activities with appellant. These covered considerable periods of time and her sole testimony extended to decisive events such as receipt of heroin from him and conversations with him, on at least three different nights. The lack of corroboration not only aggravated the lack of any specific testimony stamping Floyd as a seller and appellant as her active assistant. It rendered appellant's conviction on these counts inherently doubtful in view of the fact that proof of possession was erroneously submitted to the jury as the sole and decisive question.

(2) 26 U.S.C. 4704(a) (Counts 5, 8, 11, and 14) reads in pertinent part as follows:

"..... the absence of appropriate tax paid stamps from narcotics drugs shall be prima facie evidence of a violation of this subsection by the person in whose possession the same may be found." (Emphasis Supplied.)

The judge explained this provision to the jury as follows:

"The law does not require direct proof of a purchase, sale, dispensing or distribution of a drug. The statute specifically states that the absence of appropriate taxpaid stamps from narcotic drugs shall be prima facie evidence of a violation of this subsection by the person in whose possession the same way be found. In other words, if it is proven that the defendant had possession of those drugs and that while in his possession there was no appropriate taxpaid stamps on those drugs, these facts constitute prima facie evidence of a violation of the statute and the jury may find the defendant guilty on that charge, if it sees fit to do so, without requiring any further proof." (J.A. 83. Underscoring supplied.)

Again the judge adopted these remarks by reference in the case of the other similar counts. We pass the fact that

18/ The testimony of agent Pappas only corroborated some of Floyd's movements on one night (J.A. 72-74). Fialkewicz' testimony of appellant's statements to him on February 2nd did not corroborate any specific evidence given by Floyd, but merely showed that appellant had some general knowledge of her activity. Indeed, it may only have referred to the night of January 29 and 30 even in this respect (J.A. 62). In any event, no one corroborated her testimony as to past possession of the heroin by appellant, and this was the only basis on which the judge submitted the case to the jury. See text, above.

Floyd never testified to an absence of stamps on the drugs while in appellant's possession. What has been said above in the preceding subsection of this brief would be equally in point here, were it not for the fact that the presumption clause in 26 U.S.C. 4704(a) was erroneously invoked in any event.

That clause could only have applied here if appellant (not Floyd) had been "the person in whose possession" the heroin was "found" by the agents. This is the plain meaning of the language used by Congress. See, e.g. Webster's New International Dictionary, Unabridged (2nd Ed.), p. 948 ("Find"); State v. Jenkins, 321 Mo. 1237, 14 S.W.2d 624; State v. Marshall (Ohio Mun.), 105 N.E.2d 891. Of course, such a provision, placing the burden of explanation on a criminal accused, must be strictly construed. The language Congress used was not inadvertant, for in the corresponding earlier provision of 21 U.S.C. 174, quoted above, it chose vitally different words.

Floyd was found with the narcotics in her possession. She was "the person"; and there could only be one. Her own testimony extended only to appellant's past possession. This no more satisfied the statutory requirement than the mere fact of past residence in a district, long since ended, satisfies the requirements of a venue statute authorizing suit wherever the defendant is "found." See, e.g. People's Tobacco Co. v. American Tobacco Co., 246 U.S. 79.

The inapplicability of this clause, of itself did not prevent conviction, of course. However, the judge's charge, as quoted, and his failure (again) to instruct the jury on an alternative theory of proof going to every element of the crime charged did so. In effect he led the jury to desert the required path and take a false shortcut. The result was to assume appellant's conviction unless he came forward with proof not required of him in the circumstances. This was error.

(3) 26 U.S.C. 4705(a) (Counts 4, 7, 10, and 13) contains no presumption, of course. The trial judge recognized that fact, but failed to admonish the jury of it in his "explanation" of the statute. This explanation consisted of no more than a bare paraphrase of the statute and was sandwiched immediately between his remarks noted in the preceding two subsections (J.A. 82, 83). These factors could hardly have failed to confuse the jury in view of the heavy emphasis placed on its "right" to convict under the other two statutes on the basis of past possession "without anything more." The judge made no effort to avoid such confusion. His failure to distinguish the requirements of the instant statute was again coupled with a failure to define what is a "sale". Again there was error stemming from the court's consistent tendency to ignore the common minimal protections which are the right of any criminal defendant.

E. The Charge As A Whole Constituted An
Argument Of The Government's Case,
An Invasion Of The Jury's Functions,
And A Gross Violation Of Appellant's
Rights.

In the preceding subsections we have repeatedly noticed not only specific errors but a continuing pro-government bias in the tenor and conduct of the trial judge's instructions. While this bias was not blatant, it was unmistakeable and unrelenting. The same bias was more frankly revealed at the sentencing of appellant and Floyd (J.A. 100-102) which occurred shortly after the trial with no intervening events to alter the judge's attitude. See IV(a), above. During the charge itself the judge commented extensively on the evidence. While he twice warned the jury that his view of the facts was not binding upon it (J.A. 77, 86), it is impossible to expect that the jury could separate advisory factual comment from binding legal instruction in the circumstances. For example, his comment that Floyd was "corroborated by a number of Government agents" (J.A. 79), whereas in fact she was not corroborated in the essentially incriminating aspects of her testimony, was both confusing and prejudicial. By its phras-

ing and position amidst the legal discussion of accomplice testimony it had the distinct aura of a binding legal instruction. Yet it was at least a partial and vital misstatement of fact, well calculated to create the inference that Floyd's credibility was as good as that of the agents. Similarly, the jury were in effect led to believe that the Kelly and Jackson testimony showed appellant's knowledge of "what was going on" between Floyd and Fialkewicz a month later "J.A. 85). This was erroneous both legally and factually, and it also implied that such knowledge alone would incriminate appellant, without regard to his intent and purpose.

The judge's comments on the narcotics laws merely added to the prejudice, particularly in the context of his consistent failure to define the offenses charged to appellant. Thus, he stated that all use of narcotics not under the legitimate supervision of a physician is "dangerous and susceptible of an evil and insidious influence" which the narcotics laws seek to prevent. He continued (J.A. 81):

"All traffic in narcotics outside of the channels prescribed by law, as I have just indicated, is illicit and is criminal, because of its detrimental effect on the community."

Whether or not the comment was factually true it had no place in a charge directed to specific alleged offenses. It served merely as an incitement to convict appellant as a "criminal" if he had engaged in any "traffic" not prescribed by law. Thus, appellant might have facilitated the transportation of heroin to Floyd (see J.A. 82, at the top), but he was not indicted for this.

Finally we note the treatment of reasonable doubt. At the outset of his charge, the judge discussed this question (J.A. 77, 78) and never again mentioned the requirement, throughout his discussion of 15 counts, three statutes, six alleged transactions and two other incidents, as well as the highly complex questions of conspiracy, accomplice testimony, statutory definitions and presumptions, and aiding and abet-

ting. It would be an endless and redundant task to point up the instances in which this omission was vitally harmful. The matter is inseparable from the errors previously discussed, particularly the manifold encouragements to the jury to believe Floyd and return a verdict of guilty. The treatment of reasonable doubt in the circumstances shown was the very sort of error disapproved by this Court in Billeci v. United States, 87 U.S. App. D.C. 274, 184 F.2d 394, 24 ALR 2d 881. In Billeci the Court condemned the practice of placing protective instructions in an obscure early portion of the charge, with the result that they were overbalanced by subsequent indications to the jury that it could convict on the basis of mere belief, whether or not a reasonable doubt survived. In essence that was the case here too.^{19/}

In sum, the charge was a virtually unrelieved argument for the Government in its cumulative impact. It contained repeated and major errors of law which were compounded by the unmistakable animus of the judge himself. On the whole, it constituted a deep and irreparable prejudice to defendant's rights.

^{19/} In its September 5th Opposition (pp. 8, 9) the Government sought to distinguish Billeci and limit it to the facts of that case, viz. a supplemental instruction given the jury after it had once retired. The principles stated by the Court in that case, 87 U.S. App. D.C. 283, 184 F.2d 403, 24 ALR 2d 881, 894, 895 "are well settled" (Ibid) and obviously of more general application. Throughout the charge in this case the court discussed the evidence and law in a one-sided manner, adverting only to the facts which supported the Government's case, and stressing only the principles relied on by the prosecution. Repeatedly (J.A. 82 and 83) it encouraged conviction on mere belief alone. Only the initial remarks gave any protection and these were repeatedly and entirely vitiated by what followed. To say that a single reference to such a basic principle satisfied the requirement of elemental fairness regardless of what follows--as the judge said in effect in response to counsel's objection on this ground (J.A. 87)--is to reduce fairness in a charge to a matter of checklists and mathematical formula. Counsel's objection was well-taken.

CONCLUSION

Appellant submits that the judgment of the court below should be reversed, for the reasons stated.

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APPENDIX

1. The Act of February 9, 1909, 35 Stat. 614, as amended, 21 U.S.C. 174, in pertinent part:

"Whoever fraudulently or knowingly imports or brings any narcotic drug into the United States or any territory under its control or jurisdiction, contrary to law, or receives, conceals, buys, sells, or in any manner facilitates the transportation, concealment, or sale of any such narcotic drug after being imported or brought in, knowing the same to have been imported contrary to law, or conspires to commit any of such acts in violation of the laws of the United States, shall be fined not more than \$2,000 and imprisoned not less than two or more than five years.....

"Whenever on trial for a violation of this subdivision, the defendant is shown to have or have had possession of the narcotic drug, such possession shall be deemed sufficient evidence to authorize conviction unless the defendant explains the possession to the satisfaction of the jury."

2. The Act of August 16, 1954, 68A Stat. 550, as amended, 26 U.S.C. (1954) 4704(a), formerly 26 U.S.C. (1939) 2553 (a):

"It shall be unlawful for any person to purchase, sell, dispense, or distribute narcotic drugs except in the original stamped package or from the original stamped package; and the absence of appropriate taxpaid stamps from narcotics drugs shall be prima facie evidence of a violation of this subsection by the person in whole possession the same may be found."

3. The Act of August 16, 1954, 68A Stat. 551, as amended, 26 U.S.C. (1954) 4705(a), formerly 26 U.S.C. (1939) 2554(a):

"It shall be unlawful for any person to sell, barter, exchange, or give away narcotic drugs except in pursuance of a written order of the person to whom such article is sold, bartered, exchanged, or given, on a form to be issued in blank for that purpose by the Secretary or his delegate."

4. The Act of June 25, 1948, 18 U.S.C. 371:

"If two or more persons conspire either to commit any offense against the United States, or to defraud the United States, or any agency thereof in any manner or for any purpose, and one or more of such persons do any act to effect the object of conspiracy, each shall be fined not more than \$10,000 or imprisoned not more than five years, or both.

"If, however, the offense, the commission of which is the object of the conspiracy, is a misdemeanor only, the punishment for such conspiracy shall not exceed the maximum punishment provided for such misdemeanor."

5. The Act of June 25, 1948, 18 U.S.C. 2:

"(a) Whoever commits an offense against the United States, or aids, abets, counsels, commands, induces, or procures its commission, is a principal.

"(b) Whoever causes an act to be done, which if directly performed by him would be an offense against the United States, is also a principal and punishable as such."

CHAMBERS OF THE DISTRICT COURT

EB-D
3-22-57
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BRIEF FOR APPELLEE

United States Court of Appeals
For the District of Columbia Circuit

—
No. 13,621
—

WILLIAM C. GREENE, *Appellant*,

v.

UNITED STATES OF AMERICA, *Appellee*

FILED MAR - 4 1957
Joseph W. Stewart
CLERK

—
Appeal From the United States District Court for the
District of Columbia
—

OLIVER GASCH,
United States Attorney.

LEWIS CARROLL,
ARTHUR J. McLAUGHLIN,
E. TILLMAN STIRLING,
Assistant United States Attorneys.

QUESTIONS PRESENTED

Having been indicted in one count for conspiracy and in fourteen counts for substantive violations of the narcotics laws, appellant was found guilty but was only given consecutive sentences on three substantive counts, the sentences on the conspiracy count and the remaining substantive counts running currently with the previous sentence.

In the opinion of the appellees the following questions are presented:

1. Is it not well settled that conspiracy does not merge with the substantive counts?

2. Where narcotics are paid for at one time but are delivered on two occasions three days apart, is there but a single continuing violation of the law, or is each delivery a separate indictable offense?

3. Was evidence of the conspiracy prior to proof of the substantive offenses properly admitted?

4. Did the instructions to the jury—

- (a) Specifically define the offenses charged;
- (b) Correctly set out the aider and abettor theory;
- (c) Sufficiently caution the jury with respect to the testimony of an accomplice;
- (d) Correctly state the presumptions to be drawn from the possession of unstamped narcotics;
- (e) Adequately explain that the jury must find "beyond a reasonable doubt."

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**United States Court of Appeals
For the District of Columbia Circuit**

No. 13,621

WILLIAM C. GREENE, *Appellant,*

v.

UNITED STATES OF AMERICA, *Appellee*

**Appeal From the United States District Court for the
District of Columbia**

BRIEF FOR APPELLEE

COUNTERSTATEMENT OF THE CASE

On May 23, 1955, appellant was indicted for conspiracy to violate the narcotic laws from December 11, 1954 to February 2, 1955, (Count 1), and for fourteen substantive counts of violating the narcotic laws (J.A. 88-95). After initially entering a plea of not guilty on May 27, 1955 (J.A. 95), appellant was allowed to withdraw this plea and on November 8, 1955, entered a plea of guilty to Counts I and VII (J.A. 98). Appellant sought and was granted leave on December 2, 1955, to withdraw his plea of guilty and enter a plea of not guilty (J.A. 98). Trial by jury on February 1 and 2, 1956, resulted in a finding of guilty (J.A. 95), and on February 10, 1956, he was

sentenced to serve from 20 months to five years imprisonment and to pay a fine of \$500.00 on Counts II, IV and VII said sentences to run consecutively by the Counts. A similar sentence was imposed on each of the twelve other Counts, to run concurrently with the sentence imposed on Counts II, IV and VII (J.A. 96-97). This appeal follows.

Barbara Floyd, appellant's co-defendant who pleaded guilty to the conspiracy count, testified that on December 11, 1955, appellant introduced her to a Mr. Kelly (who was later identified as a Federal Narcotic Agent (J.A. 29). She testified that on January 14, 1955, she met Federal Narcotic Agent Fialkewicz and another man when they picked her up at the Senate Office Building, her place of employment. (She worked as a secretary for a member of Congress, J.A. 21). They went to a restaurant in downtown Washington where Fialkewicz gave her thirty dollars with which to purchase heroin. (J.A. 2). She then went to appellant's home at 14th Street and Michigan Avenue, Northeast, Washington, D. C. and gave him the thirty dollars and received approximately thirty capsules of narcotics which she in turn gave to Fialkewicz (J.A. 3). On another occasion sometime in January 1955, after the first sale, Miss Floyd said Fialkewicz and two of his friends picked her up from work and they all went to dinner together. On the way home from the restaurant she sold him eight dollars worth of narcotics that she had previously obtained from appellant. Subsequently, Fialkewicz picked Miss Floyd up at her home gave her one hundred dollars and drove her to the vicinity of appellant's house, where she went in and gave appellant the money. The latter did not have the necessary narcotics at that time but told Miss Floyd to call him back later. She left and was driven to work by Fialkewicz (J.A. 4). Later, that night, she went to appellant's house and they drove over to Brentwood Village, where by prearrangement, she met Fialkewicz, and after obtaining 20 to 30 capsules of narcotics from appellant, she gave them to the Agents Fialkewicz and Tremoglie. She informed them that she

would deliver the remainder later that night at the Crescent Cafe downtown (J.A. 5). She and appellant drove to the Crescent Cafe about twelve-thirty or one a.m. that night, and parked his car across the street from the cafe. She crossed the street and told Fialkewicz that she was unable to obtain the rest of the narcotics that evening. While she was talking with the agents appellant also crossed the street and walked past them and waited for Miss Floyd at a nearby drug store. Appellant drove her home and told her he would get the rest of the narcotics the following day. She did obtain the narcotics from appellant the next day (a Saturday) (J.A. 7).

Miss Floyd testified that Fialkewicz came to her house the next day, (Sunday, January 23, 1955) and she gave him 35-37 capsules which she had received from appellant. On January 29, 1955, Fialkewicz called her asking for more heroin, and she told him to call back later. She then left and went to appellant's house, but left his telephone number with a friend at her home to give Fialkewicz when the latter called back (J.A. 8). While she was at appellant's home that evening Fialkewicz called and said he had eighty or a hundred dollars and wanted heroin. Miss Floyd asked appellant, who was standing near the phone if he could get that amount of narcotics. He told her to meet Fialkewicz several blocks away and get the money (J.A. 9). Appellant then drove her to the rendezvous and parked his car directly in front of the agents' car, where Miss Floyd alighted and got into the agents' car while appellant drove away from the area. She gave Fialkewicz 20 to 25 capsules of heroin and told him to call appellant's house later that evening for the remainder of the narcotics (J.A. 10). He did call appellant's house several times but the latter was not home. However, during the last call from the agent appellant entered his house and then Miss Floyd told the agent that she would meet him at the same rendezvous shortly. She met Fialkewicz and turned over to him about 30 to 40 capsules of narcotics that she had received from appellant (J.A. 11).

When asked if she recalled meeting Agent Jackson on

December 23, 1954, Miss Floyd stated she did not know him by name but when Agent Jackson was brought into the courtroom she identified him as looking like a man she met at appellant's house. She stated that the meeting came about when appellant called her at home and asked her to come over to his house to meet someone (J.A. 12).

On cross examination Barbara Floyd said she first met appellant during the summer of 1954. She admitted that she had used narcotics to some extent but that she was not "addicted" to such use. By "addicted" she said she meant use to such an extent that upon stopping the habit one would go through withdrawal symptoms (J.A. 15). When asked whether she had used narcotics since her arrest in February 1955 up until the trial, February 1956, she said she had taken dope three or four times, but not recently (J.A. 14). Miss Floyd stated that appellant was the only person from whom she obtained the narcotics that she had sold to the agents, adding that he was the only person that she knew that she could purchase narcotics from (J.A. 18). Miss Floyd said that she accompanied appellant on two trips to New York City (J.A. 19). These two trips were for the purpose of purchasing narcotics. Appellant contacted one person in New York from whom he bought the drugs (J.A. 28). She testified that she was not under the influence of narcotics at the various times she sold the drug to the agents, pointing out that she was working at that time and did not use drugs while working. (She was doing secretarial work for a United States Senator at the time of the sales in question and was working as a stenographer at the time of trial (J.A. 21).

John L. Kelly, Bureau of Narcotics Agent, testified that on December 11, 1954, he met appellant at a downtown restaurant, having arranged such meeting through a previous telephone conversation with appellant. Barbara Floyd was also present at the meeting. He discussed with appellant the matter of raising some money to get John Kimer, a mutual friend, out of jail (J.A. 30). Agent Kelly had a letter of introduction from Kimer to appellant which

Kelly showed to appellant. They discussed the possibility of obtaining narcotics to sell in order to raise the necessary bail money for Kimer, and appellant told Agent Kelly that he would contact him the next day. Appellant called Kelly the next day and the two men met at a restaurant where they discussed the possibility of appellant obtaining narcotics for Kelly to sell. It was arranged that the transaction would be carried out through one Andrea Rogers (J.A. 33).

Agent Kelly left Washington shortly thereafter, but from Greensboro, North Carolina on December 22, 1954, he called appellant at his home here, and they made arrangements for appellant to sell Kelly two ounces of heroin at six-hundred dollars an ounce (J.A. 35). Kelly told appellant he would send a man to Washington to pick up the heroin. Agent Jackson was the man sent to buy the narcotics from appellant, and on December 23, 1954, Jackson telephoned Kelly informing him that appellant wanted the money first and would deliver the drug in a day or two. Appellant, who was present during the telephone conversation, then took the phone and talked with Kelly (J.A. 35). They had an argument because appellant wanted the money but would not deliver the narcotics for several days. Kelly then instructed Jackson to call the transaction off and return to North Carolina (J.A. 36).

William R. Jackson, Bureau of Narcotics Agent, corroborated Agent Kelly's testimony about the transactions with appellant concerning the sale of two ounces of narcotics. He verified that he had gone to appellant's house at 1340 Michigan Avenue, on December 23, 1954, to pick up the two ounces of heroin, and when appellant had failed to deliver the drug at that time, had called Agent Kelly in North Carolina. He further stated that during his meeting with appellant Barbara Floyd had come in and was introduced to him. He left shortly thereafter when it turned out that they could do no business that day since appellant did not have the narcotics ready for delivery at that time. (J.A. 39).

Walter S. Fialkewicz, Bureau of Narcotics Agent, testified in corroboration of much of Barbara Floyd's testimony concerning the sale of narcotics to him. He said that on January 14, 1955, at about five p.m. he met Miss Floyd at First Street and Constitution Avenue where she got in his car and they drove a short distance to get out of the traffic. He gave her \$30.00 and she then left and got into another car that had driven up and left the area (J.A. 41). He met her again that same evening at which time she gave him 17 capsules of heroin (Government Exhibit No. 1, J.A. 42).

Agent Fialkewicz stated that on January 18, 1955, he picked Miss Floyd up at 5:35 p.m. at First and Constitution Avenue and drove her to her home which she entered. She came back out in several minutes and sold him four capsules of heroin for eight dollars which he gave her (Government Exhibit Number 2, J.A. 44).

On January 21, 1955, Fialkewicz again met Barbara Floyd and gave her \$100.00 about 8:30 on the morning, and then met her that same evening about 9:30. Agent Tremoglie was with them at that time. (J.A. 45). At that time Miss Floyd gave Tremoglie 30 capsules of heroin (Government Exhibit Number 3, J.A. 52) and immediately left and joined a man in front of a nearby drugstore, got into a 1954 Packard sedan and drove away with the man. Fialkewicz identified the man Miss Floyd met and went away with as appellant (J.A. 47). At 11:30 that same evening Miss Floyd returned in the same automobile, still being driven by appellant, alighted and informed the agents that "she and her man could not receive the narcotics in time" but would meet the two agents at a downtown restaurant at one o'clock and turn over the remainder of the narcotics (J.A. 49).

About 1:15 a.m. on January 22, 1955, Fialkewicz and Tremoglie were waiting for Barbara Floyd at the designated restaurant when they saw the 1954 Packard drive by, make a U-turn and park across the street. She alighted from the car which was being driven by appellant, crossed the street and entered into a conversation with the agents

(J.A. 50). She informed Fialkewicz that she and her man were still unable to obtain the narcotics and asked him to call her later at her residence. While this conversation was transpiring, appellant got out of the Packard, locked it, crossed the street and waited for Miss Floyd, who joined him and the two walked away together (J.A. 51). Agent Fialkewicz next saw Miss Floyd the next day, January 23, 1955, at her home, at which time he received 37 capsules from her (Government Exhibit Number 4, J.A. 53).

On January 29, 1955, Fialkewicz spoke with Miss Floyd on the telephone and she told him to call her back in a half an hour, which he did. Miss Floyd had left, but the woman who answered the telephone told Fialkewicz to call number LAWrence 6-6787, which number was listed for appellant. He called the number, spoke with Barbara Floyd and was informed that she would sell him some narcotics if he would meet her at 14th and Webster Streets, Northeast. During this telephone conversation, Fialkewicz said whenever he would ask Miss Floyd about the narcotics she would in turn and speak to someone she addressed as "Bill" (J.A. 55). Shortly after 10:00 p.m. that evening the agents observed the Packard automobile approach the 14th and Webster Street area and park. Fialkewicz made a U-turn and parked directly behind the Packard, got out and walked to the passenger side of the car. He heard Miss Floyd saying to appellant, who was the driver, "You are putting me out in front and I am doing your work for you" (J.A. 56). Thereupon she left the Packard, got into the agents' car and instructed them to drive around the block and park. When Fialkewicz did this Miss Floyd gave him 20 capsules of heroin (Government Exhibit Number 5, J.A. 57) and told him to come back in about an hour to receive the rest. The agent gave her \$80.00, and then drove back to 14th and Webster Streets. Barbara Floyd noticed that the Packard had left and she said, "Well, he left me again" (J.A. 57). Fialkewicz then drove her to 14th and Michigan Avenue, and observed her enter appellant's house at 1340 Michigan Avenue.

Later that evening, shortly after 12 midnight, Fialkewicz called Miss Floyd at appellant's house and talked to her for ten to fifteen minutes. Then she said, "Here they come now" and placed her hand over the phone and talked to someone named "Bill". Then she continued her conversation with the agent telling him she would meet him at "the same place in about ten minutes". He drove back to 14th and Webster Streets and waited for Barbara Floyd, who was again driven up in the Packard automobile. She entered the agent's car, instructed him to drive around the block, and when he had done so she gave him 33 more capsules of heroin (J.A. 59). These capsules were introduced as Government Exhibit Number 6 (J.A. 60).

Agent Fialkewicz testified that on February 2, 1955, he called Miss Floyd at appellant's home to order some more heroin. The latter answered the phone, and after saying that Barbara was not there asked Fialkewicz what he wanted. He told appellant he wanted to "pick up 30." Appellant then asked, "Thirty capsules or \$30.?" and when the agent said "capsules" appellant said, "I will take care of you" (J.A. 62). When the agent asked to speak to Barbara Floyd he was informed by appellant that she was not there but that she delivered for him. Fialkewicz then gave appellant the number of the phone from which he was calling, and hung up. Appellant called back in ten minutes and told Fialkewicz where he would meet him (J.A. 62). They met and after conversing appellant told the agent to meet him later at another place. He went to the next meeting place and awaited appellant's arrival. He drove up in a car with an unidentified man, nodded to the agent and then drove away. That was the last Agent Fialkewicz saw of appellant (J.A. 63).

Joseph J. Tremoglie, Bureau of Narcotics Agent, gave extensive testimony corroborating Agent Fialkewicz's testimony concerning the dealings with Barbara Floyd (J.A. 65-70). He also identified appellant as the driver of the blue Packard automobile in which Miss Floyd was driven to the Brentwood Village rendezvous where she delivered

30 capsules of heroin to the agents. He saw appellant and Agent Fialkewicz conversing together at their February 2, 1955, meeting (J.A. 69).

Agents Wilson, Gannon and Pappas also testified concerning various details of the transactions between Miss Floyd, appellant and Agents Fialkewicz and Tremoglie during January and early February.

At the termination of the Government's evidence appellant moved for a judgment of acquittal which was denied. The defense then announced that its case was closed (J.A. 75). Appellant submitted a requested instruction (J.A. 95) asking the court to tell the jury that a drug addict "is inherently a perjurer" and that such testimony should "be received with suspicion and acted upon with caution." The court refused to "brand any witness as inherently a perjurer" but did agree to give a cautionary instruction concerning Barbara Floyd's testimony as an accomplice.

During a lengthy and careful charge the court told the jury, *inter alia*, that the Government must prove the defendants guilty beyond a reasonable doubt (J.A. 77). The court emphasized this point by saying, "Now let me repeat, the burden of proof on the Government is to prove the defendants' guilt beyond a reasonable doubt" (J.A. 77-78). A complete discussion of the meaning of reasonable doubt followed (J.A. 78). Also the court pointed out that Barbara Floyd was an accomplice and therefore her testimony "should be received with care and scrutinized with caution" (J.A. 79).

At the close of the charge appellant requested the court to tell the jury that if they believed a witness did not tell the truth about a matter, they had a right to disregard the entire testimony of that witness. In denying this request the court noted that the request came too late and to give it as a supplemental instruction would be unduly stressing that particular point. The court further noted that the belatedly requested instruction had no basis and was only given where there was a conflict in the testimony,

appellant having put on no testimony (J.A. 86). The jury returned a verdict of guilty (J.A. 96). On February 21, 1956, the court denied appellant's petition for leave to proceed on appeal without prepayment of costs with the following notation (J.A. 96), "Application to proceed on Appeal without prepayment of costs, denied, first because there is no substantial question; and second, the defendant makes an insufficient showing of poverty. He was represented at trial by retained counsel."

STATUTES INVOLVED

The applicable statutes are found at pages 30 and 31 at the end of this brief.

SUMMARY OF ARGUMENT

The law is well settled that a conspiracy count does not merge with substantive counts, and the present case is not an exception to this rule. Merely because a single payment of money was made for two separate deliveries of narcotics on different days does not make the two transactions a single continuing crime. The Act seeks to penalize the transfer of unstamped narcotics, not the payment of money for such drugs. Therefore, each separate delivery constituted a violation of the Act. Evidence tending to show appellant's knowledge of the conspiracy was properly admitted even though such evidence did not constitute a substantive offense under the narcotics laws. The evidence adduced was so concrete, and so thoroughly established appellant's culpability (his accomplice told the whole story) that the charge to the jury in which this evidence was summed up might well seem to be against appellant. However, the law was correctly stated and the court's comments on the evidence followed the testimony as given. Appellant was in no way prejudiced by the charge, and his subsequent conviction was supported by all the evidence.

ARGUMENT**I****Convictions On Both The Conspiracy And The Substantive Counts Was Proper**

The record shows that appellant and Miss Floyd had become friends at least six months prior to the formation of the conspiracy charged. They went to New York on two occasions in order that appellant could purchase narcotics from a contact he had there. Besides accompanying appellant on two out of town trips to buy narcotics, Miss Floyd was present in December when appellant was making arrangements to sell two ounces of heroin to undercover agents. During the period of the conspiracy charged she was a frequent visitor to his home, which was used as a base of operations for the illicit traffic in narcotics, and the sales often took place within a few blocks of appellant's home. Appellant usually chauffeured Barbara Floyd to the place where she met the agents to sell the narcotics, and on one occasion an agent in the presence of both appellant and Floyd heard the latter chide the former for always putting her out in front. Miss Floyd gave the agents appellant's telephone number saying she could be reached at the latter's home on occasion, and once when an agent called her at this number appellant answered and said Barbara was not there, but offered to take care of the agent's order himself.

With respect to all but one of the substantive counts (Count III) Miss Floyd followed more or less the same pattern, that is, she took the agents' money, went off to see appellant and obtain the drugs from him, and then again meet the agents for the delivery. Appellant would usually drive her to these meetings, and after delivery, the two would drive off together. In respect to Count III,¹ wherein it was charged that appellant and Floyd concealed and sold narcotics knowing them to have been imported

¹ The sentence imposed on Count III runs concurrently with the sentences imposed on Counts II, IV, and VII.

contrary to law, Floyd testified that the capsules she delivered to Agent Fialkewicz and two of his friends had been obtained from appellant.

Appellant argues that his conviction on the conspiracy count bars his conviction on the 14 substantive counts since both require identical proof. "It is settled law in this country that the commission of a substantive offense and a conspiracy to commit it are separate and distinct crimes, and a plea of double jeopardy is no defense to a conviction for both." *Pereira v. United States*, 347 U.S. 1, 11 (1954); *Pinkerton v. United States*, 328 U.S. 640, 643 (1946); *Freeman v. United States*, 146 F.2d 978, 979 (6th Cir. 1945); *Woods v. United States*, — U.S. App. D.C. —, — F.2d —, (Nos. 12861—71, decided December 31, 1956). The conspiracy required proof of an agreement between Floyd and appellant, and even if appellant were only guilty of the substantive counts as an aider and abettor, this would not preclude his conviction on the conspiracy count. "Aiding, abetting, and counseling are not terms which presuppose the existence of an agreement." *Pereira v. United States*, *supra*.

Obviously facilitating the sale of narcotics is not the type of crime which by necessity requires the concerted action of two or more persons. Although conceding that a conviction for both crimes may be had in some instances, appellant argues (Br. p. 21), "Since there was a necessary identity of evidence in both respects, the crimes charged were truly identical and appellant's conviction under count 1 barred his conviction for the substantive crimes." In support of this argument he cites *Krench v. United States*, 42 F.2d 354 (6th Cir. 1930) and *Freeman v. United States*, *supra*. Although these two cases from the Sixth Circuit seem to stand alone in their holding (see dissent in *Freeman*, 146 F.2d at 980-982) both are distinguishable from the present case. In *Krench* the defendant procured two men to bring a number of cases of Canadian beer into this country in violation of the applicable laws. The court held that since the defendant merely procured two others to import the beer, and took no part in the actual

illegal importation, it was error to impose double punishment on him.² In other words there was no evidence that the defendant had performed any of the overt acts in the substantive counts. In the instant case there is ample evidence through Floyd's testimony showing appellant's participation in the actual sale of heroin, as well as his participation in the whole scheme to sell narcotics.

In *Freeman v. United States*, *supra*, the defendant was indicted in two substantive counts and a conspiracy count. The evidence for the first count showed that conspirator A delivered narcotics to a buyer on October 10th, and conspirator B delivered narcotics on October 11th, and that the defendant in each case collected the money. This was the sum total of the evidence. Thus in proving each of the two substantive counts it was necessary to show concerted action between the defendant and one of the other of the two conspirators, *i.e.*, delivery by one and receipt of money by the other. The transaction was not complete until it had been shown that the defendant received the money for each sale.³ In the instant case however it was not necessary to show appellant's participation in each of the transactions before each was a completed act, *i.e.*, the crime could have been completed without his participation (this is not to say that he was not involved in the transaction).

To make the distinction between *Freeman* and the instant case even more apparent, we need only apply the oft stated rule that crimes are separate and distinct if each requires a different element of proof. *Green v. United States*, 98 U.S. App. D.C. 413, 236 F.2d 708 (1956), *cert. granted*, 352 U.S. 915; *Morgan v. Devine*, 237 U.S. 632 (1915). To prove both the conspiracy and the substantive counts in *Freeman* joint and concerted action had to be shown,

² In the instant case there is no question of double punishment since appellant's sentence on the conspiracy count runs concurrently with that imposed on the substantive counts.

³ See *Razete v. United States*, 199 F.2d 44, 50 (6th Cir. 1952), *cert. denied*, 344 U.S. 904, wherein the same court limits and discusses their previous decision in *Freeman v. United States*.

while in the instant case no concert of action had to be shown between appellant and Floyd to prove the substantive counts.

This is not the type of case about which Mr. Justice Jackson spoke in *Krulewitch v. United States*, 336 U.S. 440, 453 (1949) where "a hodgepodge of acts and statements by others" are admitted against the accused. None of the evidence admitted in the instant case was in the nature of hearsay that would have been inadmissible except for the conspiracy count. The conspiracy was proved, not by any testimony from Miss Floyd that she and appellant agreed to sell narcotics illegally, but rather was proved by all the facts and circumstances of the case including proof of the substantive acts. A conspiracy is typically shown by such facts and circumstances rather than by direct testimony. *United States v. Manton*, 107 F.2d 834, 839 (2nd Cir. 1938), *cert. denied*, 309 U.S. 664; *United States v. United States Gypsum Co.*, 67 F. Supp. 397, 451 (D.C.D.C. 1946, Special Three Judge Court), reversed on another ground, 333 U.S. 364. However since appellant does not claim in this respect that it was error to admit evidence under the conspiracy count, but only that the Government should have elected which count, the conspiracy count or the substantive counts, should have gone to the jury, this Court is not confronted with the problem of whether or not evidence came in under a conspiracy count when no such count should have been charged. See *Krulewitch v. United States*, *supra*; dissenting opinion in *Woods v. United States*, *supra*.

Since the record shows that appellant did not request the trial court to compel an election of counts between the conspiracy and the substantive counts, this Court is not required to consider now the merits of such contention. *Aikens v. United States*, 98 U.S. App. D.C. 66, 232 F.2d 66 (1956), and cases therein cited. Additionally, appellant has shown no prejudice, and cannot, since the sentence imposed on the conspiracy count runs concurrently with the sentence imposed on the substantive counts, and is

less than the maximum sentence that could have been imposed under the substantive counts.*

II

Appellant Was Not Convicted Twice For The Same Offense

The evidence with respect to the 4th, 5th, and 6th Counts showed that Agent Fialkewicz gave Miss Floyd \$100 on the morning of January 21, 1955, and she in turn gave the money to appellant. That same evening Miss Floyd went to appellant's house where she received 20-30 capsules and then the two drove to a rendezvous in Brentwood Village, where she gave the capsules of heroin to Agents Fialkewicz and Tremoglie (J.A. 5). The evidence adduced to support the 7th, 8th, and 9th Counts showed that on January 23, 1955, Agent Fialkewicz came to her house and got 35-37 capsules of heroin (J.A. 8). Because only one payment was made for the two deliveries appellant argues that there was only one transaction that violated the narcotics laws, and consequently it was error to indict and convict for two separate transactions. Before going into the merits of this contention it is well to again note that only three consecutive sentences were imposed although appellant was convicted on fifteen counts, so that even if appellant's contention were sustained with respect to Counts VII, VIII, and IX, the sentence that was imposed does not exceed the maximum that could have been imposed on the other counts and he has not been prejudiced.⁵

The question raised by appellant is what has Congress made the "allowable unit of prosecution." *United States v. Universal C.I.T. Credit Corp.*, 344 U.S. 218, 221 (1952). Appellant's position would indicate that in his opinion the unit of prosecution is determined by the passage of the purchase money for the narcotics, i.e., if money is paid only one time though narcotics may be delivered over an

* *Hirabayashi v. United States*, 320 U.S. 81, 85 (1943); *Wanzer v. United States*, 93 U.S. App. D.C. 412, 208 F.2d 45 (1953).

⁵ Footnote 4, *supra*.

extended period there is, in his view, only a single violation of the applicable statutes. He further argues that if the Government's position were upheld, he could have been separately indicted for each capsule sold, which could have resulted in 201 indictments for a single transaction (Br. 24). This *reductio ad absurdum* does not follow, because the Government has not attempted to break down a single delivery into the number of items delivered in a single transaction.

In *Blockburger v. United States*, 284 U.S. 299 (1932) the defendant was indicted in the 2nd Count for selling narcotics on a given day. In the 3rd Count he was indicted for selling narcotics on the following day—both sales to the same buyer. The evidence showed that when the first sale (Count II) was completed by delivery of the drugs, the defendant received the money for drugs to be delivered the following day. The delivery of the drugs on the day following passage of the purchase money formed the basis of the 3rd Count, and the Supreme Court upheld consecutive sentences imposed on the two counts, clearly indicating that the delivery of the drugs is the unit of prosecution, even though the purchase money had been paid on a previous day.

In *Blockburger* the Court made it clear that; 284 U.S. at 302, 304:

* * *

“The test is whether the individual acts are prohibited, or the course of action which they constitute. If the former, then each act is punishable separately . . . If the latter, there can be but one penalty.”

* * *

“The Narcotics Act does not create the offense of engaging in the business of selling the forbidden drugs, but penalizes any sale made in the absence of either of the qualifying requirements set forth.

* * *

“The statute is not aimed at sales of the forbidden drugs *qua* sales, a matter entirely beyond the authority of Congress, but at sales of such drugs in violation of the requirements set forth as aids to the enforcement of the stamp tax imposed by the act.”

That case negatives the element of passage of consideration as the determining factor in the illegal transaction.⁶ The very wording of Sections 4704(a) and 4705(a) also negatives this element by making it illegal not only to sell narcotics, but to barter, exchange, dispense or *give away* such drugs.

Admittedly *Blockburger* is not factually identical with the present case, but the principle is equally applicable. In that case there were two separate payments of money, while in our case money was passed only once in reference to Counts 4 through 9. But since the actual delivery would seem to be the proscribed transaction, the accompanying words of the participants are not controlling. Our case would have been identical with *Blockburger* if the Agent had given Miss Floyd the \$100 and upon receiving only 30 capsules, then asked for his change, and upon receiving it immediately given it back to her and said the remaining money would be advance money for the delivery of 35-37 capsules two days later. But since the Act is designed to penalize the transfer of unstamped narcotics and/or not pursuant to a proper order form, it would be chimerical to make the violation turn on the financial arrangements made by the interested parties. Surely the Government does not have to even show that the traded drug has been paid for by the receiver.

The case of *Bell v. United States*, 349 U.S. 81 (1955) sheds considerable light on the problem of what constitutes the unit of prosecution. In *Bell* the defendant was indicted in two counts for transporting two women across state lines in violation of the Mann Act, each count naming a different woman. Both women were transported at the same time in one car. Upon conviction the defendant was given consecutive sentences on the two counts. In reversing, the Supreme Court noted that the constitutional basis of the Mann Act was the withdrawal of the facility

⁶ Compare *Ferguson v. United States*, — U.S. App. D.C. —, 239 F.2d 952 (1956).

of interstate transportation.⁷ Therefore, it can be deduced that the unit of prosecution in a Mann Act prosecution is determined by the number of times interstate transportation is used. Likewise under 21 U.S.C. § 174 the unit of prosecution is the number of times narcotics are imported into this country illegally, and under 26 U.S.C. 4704(a) and 4705(a) the number of times a quantity of narcotics are transferred, whether by sale, barter or even gratis.⁸ This does not necessarily mean that a single delivery of narcotics or a single importation may be broken down in separate counts, each identifying a different capsule, if the entire group is delivered or imported at one time.⁹ This is obvious since in such a case there is but a single delivery or transfer. Consequently, appellant's conviction on Counts 4 through 9 was perfectly proper.

III

No Evidence Was Improperly Admitted

Appellant contends that the testimony of Agents Kelly and Jackson was erroneously admitted in support of the conspiracy count. It will be recalled that Count 1, the conspiracy count, charged appellant and Barbara Floyd with conspiring between themselves and with other persons unknown to the Grand Jury to commit violations of the narcotics laws between December 11, 1954 and February 2, 1955. The testimony of Agents Kelly and Jackson was admitted in support of this count, as showing the existence of the conspiracy at that time. Agent Kelly testified that he met and discussed arrangements with appellant con-

⁷ "Unlawful transportation is the gist of the offense" under the Mann Act, *Robinson v. United States*, 143 F.2d 276, 278 (10th Cir. 1944).

⁸ In *Grabenheimer v. United States*, 194 F.2d 447, 448 (6th Cir. 1952) defendant was convicted under 26 U.S.C. § 2593(a). The evidence showed that he was arrested and found in possession of some marijuana (Count I), and when the police took him back to his apartment another cache of the drug was discovered (Count II). In upholding convictions and consecutive sentences on both counts, the court cited *Blockburger v. United States*, supra, noting that the same evidence did not prove both counts.

⁹ *Rayborn v. United States*, 234 F.2d 368 (6th Cir. 1956).

cerning the obtaining of two ounces of heroin at \$600 per ounce. Barbara Floyd was present at their initial meeting when the arrangements were made, and although there was no testimony to show what her part in the scheme was, it cannot seriously be contended that she was merely an innocent bystander.¹⁰ Appellant would hardly have discussed illicit traffic in heroin in her presence had she not been his confidant in the plan. Further, as showing a conspiracy with "other persons unknown to the Grand Jury" Agent Kelly testified that appellant told him (J.A. 33), "If you want to deal with me, you will have to do it through Andrea Rogers." This latter person was never seen by the Agents because the transaction did not materialize, but this fact does not detract from Agent Kelly's testimony as showing appellant's complicity in a conspiracy to sell narcotics. Agent Kelly's testimony concerning the existence of the conspiracy in December was corroborated by the testimony of Agent Jackson, who also testified that when he went to appellant's house to pick up the heroin he too was introduced to Barbara Floyd. Clearly, therefore, the testimony of these two agents was admissible. Even assuming that this testimony was improperly admitted, the record shows that appellant did not object to its admission until the close of Agent Jackson's testimony, at which time the court overruled the objection noting that the time for making objection is when the testimony is first offered. Further, the record clearly shows that no prejudice resulted from the admission of this testimony. The evidence of conspiracy was so overwhelming, and coming directly from the mouth of one of the conspirators, Miss Floyd, that elimination of the questioned evidence still "leaves the Government's case unshaken" and such evidence could "at most have had but very slight effect." *Woods v. United States, supra*, citing *Kotteakos v. United States*, 328 U.S. 750, 754 (1946).

¹⁰ "Proof of prior acquaintance and association between the alleged conspirators is competent. It tends to show that their entering into the conspiracy charged was not improbable". *Minner v. United States*, 57 F.2d 506, 510 (10th Cir. 1932).

now to show whether she had any part in it
But not the same conspiracy - since there was a different co-conspirator.

Appellant also objects to the admission of Miss Floyd's testimony concerning her transactions with the agents and appellant because the conspiracy was not shown to be already in existence, citing *May v. United States*, 84 U.S. App. D.C. 233, 175 F.2d 994 (1949), *cert. denied*, 338 U.S. 830, *reh. denied*, 338 U.S. 882, (Br. 26). The rule in the *May* case does not purport to govern the order in which evidence shall be presented, which is a question left to the attorneys subject to the sound discretion of the trial judge.¹¹ It is left up to the jury to collocate the evidence. Since the existence of the conspiracy was amply shown by the Government, whether before or after the admission of the objected to testimony, such testimony was properly admitted.

This is not a case of establishing a conspirator's complicity by the acts and declarations of a co-conspirator. Appellant's part in the conspiracy and in each of the substantive offenses was described and testified to by the direct testimony of Barbara Floyd. Therefore her testimony is not hearsay which can only be brought into the case by first showing the existence of the conspiracy. See *Glasser v. United States*, 315 U.S. 60, 74-75 (1942). Even in the absence of the conspiracy count Miss Floyd's testimony would have been admissible because she was giving direct testimony of her own actions alone and in the presence of appellant. However, since the conspiracy was adequately shown her testimony was properly admitted in support thereof.

IV

The Instructions Were Complete And Proper

Appellant alleges that (Br. 32):

“Here as well as elsewhere the Judge failed to specify and define the specific offenses charged, although he generally implied that it was either ‘selling or delivering.’ ”

¹¹ *Hoeppel v. United States*, 66 App. D.C. 71, 76, 85 F.2d 235 (1936), *cert. denied* 229 U.S. 557; *McDonald v. United States*, 77 U.S. App. D.C. 33, 133 F.2d 23 (1942); *United States v. United States Gypsum Co.*, *supra*.

The record (J.A. 81-85) clearly shows that the court took up each count and not only explained it to the jury but read the related statute to them.¹² Thus there is no basis for appellant's charge that the court failed to define the specific charges involved. Although appellant did make many objections to the instructions, the record shows that he never objected to the court's alleged failure to specifically define the charges, and the point is not now reviewable. *Pitts v. United States*, U.S. App. D.C., 237 F.2d 217; Rule 30, F.R. Crim P.

Appellant also alleges that the instructions on the aider and abettor rule were inadequate and erroneous as a matter of law. On this point the court told the jury that (J.A. 86), "... any person who aids or abets or assists another in committing a criminal offense may be charged himself as a principal in that offense. As further explanation of this point the court gave as an example a person who drives a car to the place where a crime is to be committed in order to enable the commission of the crime, and "he knows the purpose for which he is driving the car, he is guilty of the offense, to the same extent as the person who actually commits the offense." Appellant says this instruction is deficient in that the court did not tell the jury that the aider and abettor must have "a purpose to promote" the consequences intended by the principal (Br. 33).¹³

In *Nye & Nissen v. United States*, 336 U.S. 613, 619 (1949) the Supreme Court said, adopting the language of Judge L. Hand in *United States v. Peoni*, 100 F.2d 401 (2nd Cir. 1938):

"In order to aid and abet another to commit a crime it is necessary that a defendant 'in some way asso-

¹² Illustrative is the court's explanation of Count Two (J.A. 81-82), wherein the court said, "In other words, the violation consists in facilitating the concealment and sale of a narcotics drug which had been imported into the United States contrary to law, the defendant knowing it has been so imported.

¹³ Previously in the charge the court had told the jury (J.A. 79-80) "It is sufficient to show, in proving a conspiracy, that the alleged conspirators tacitly came to a mutual understanding to accomplish an unlawful design."

ciate himself with the venture, that he participate in it as in something that he wishes to bring about, that he seek by his action to make it succeed.' ”

Appellant argues that (Br. 33), “If appellant did not share Floyd’s purposes, or if he did and her innocent purpose was not to sell, but to help Fialkewicz buy from others, in either event he could not be guilty under the aider and abettor rule.”¹⁴

He then goes on to argue that if Floyd and appellant were merely trying to help the agents buy narcotics from other third persons he would not be guilty. The *Sawyer*, *Moses*, and *Adams* cases¹⁵ cited by appellant are cases wherein it was held that appellant was not guilty of being associated with another as a seller of narcotics, but was merely a procurer or agent for the real seller. In *Moses* the defendant introduced the undercover agent to a seller, and the subsequent sales were made to the agents out of the defendant’s presence. There was no evidence to show that the defendant was in any way connected with the sale except that she merely introduced the agents to the seller, the act of introducing being in itself an innocent act. Since the defendant was not charged with conspiracy to sell, but solely as an aider and abettor the court said, 220 F.2d at 168,

“Although appellant’s conduct was prefatory to the sale, it was not colloaborative with the seller. For this reason the conviction cannot stand.”

Manifestly appellant’s course of action as described by Floyd cannot be put in the same innocuous class as the defendant’s in *Moses*. Actually supplying the drugs for sale and receiving the money from Floyd after the sales had been made is not an innocent act, like introducing

¹⁴ Miss Floyd’s purpose was not entirely “innocent” as she pleaded guilty, was sentenced, and is now serving time on Count I.

¹⁵ *Sawyer v. United States*, 210 F.2d 169 (3rd Cir. 1954); *Adams v. United States*, 220 F.2d 297 (5th Cir. 1955); *United States v. Moses*, 220 F.2d 166 (3rd Cir. 1955).

buyers to a seller, which would not by itself show appellant's complete complicity in the entire scheme.

Likewise in *Adams v. United States*, supra, there was no conspiracy count, the defendant being charged only as a seller. The Court reversed the conviction on the ground that the defendant was nothing more than a purchasing agent or messenger, since there was no evidence to show that she was in any way associated with the real seller. In *Sawyer v. United States*, supra, also, the court indicated that the defendant was acting in the purchaser's behalf, was not associated with the person from whom she obtained the drugs, was not associated in selling them and therefore was not guilty as a seller.

In all three of these cases¹⁶ a conspiracy was not charged and it was not shown that the defendants were associated with the person from whom they obtained the drugs as a seller. Furthermore, these three cases are not applicable to the present case because in each, the defendant was the procuring agent, or middle-man, so at most the cases would apply to Barbara Floyd's situation, not that of appellant, who dealt at arm's length with the agents. *United States v. Valdes*, 229 F.2d 145, 148 (2nd Cir. 1956), *cert. denied*, 350 U.S. 996.

Consequently, since the evidence showed that Barbara Floyd and appellant were closely associated in the scheme to sell narcotics illegally, there was ample basis for the court's instruction that appellant could be guilty as a principal if he aided and abetted Floyd in selling narcotics to the agents, and knew what he was doing.¹⁷

The instructions concerning the credibility of Barbara Floyd as an accomplice were completely adequate. The court told the jury Floyd was an accomplice and therefore her testimony "should be received with care and scrutin-

¹⁶ These three cases were recently urged upon this court without success in *Duff v. United States*, — U.S. App. D.C. —, 239 F.2d 76, (1956).

¹⁷ In speaking of the term "aider and abettor" the Supreme Court said in *Pereira v. United States*, supra, 347 U.S. at 11, "Those terms have a broader application making the defendant a principal when he consciously shares in a criminal act, regardless of the existence of a conspiracy."

ized with caution." (J.A. 79). Appellant cites this Court's decision in *Fletcher v. United States*, 81 U.S. App. D.C. 306, 158 F.2d 321 (1946) for the proposition that the court should tell the jury to receive Floyd's testimony with "suspicion". (Br. 36). Initially the Government contends that the *Fletcher* case is not applicable for two reasons, and further, even under *Fletcher* the charge as given was correct.

In *Fletcher* this Court said, 81 U.S. App. D.C. at 307,

"... where the entire case depends upon his [the informer's] testimony, the jury should be instructed to scrutinize it closely for the purpose of determining whether it is colored in such a way as to place guilt upon a defendant in furtherance of the witness's own interest.

* * *

And when to this added the well recognized fact that a drug addict is inherently a perjurer where his own interests are concerned, it is manifest *either* that some corroboration of his testimony should be required, or at least that it should be received with suspicion and acted upon with caution." (Emphasis added)

Fletcher requires that either there be corroboration or that the cautionary instructions be given. In that case the conviction of selling narcotics was based entirely upon an informant's testimony—the defendant never having been ever seen by the agents. In our case there was substantial corroboration of Floyd's testimony from many sources. Appellant was seen by various agents driving Floyd to the rendezvous where she sold the heroin. Two agents talked directly with appellant in December about arrangements to sell several ounces of heroin, and Agent Fialkewicz on one occasion made arrangement directly with appellant to buy 30 capsules of heroin. Thus Floyd's testimony does not stand alone but is amply corroborated, and the cautionary instruction was not required. Miss Floyd was not an informant. She was always dealing at arm's length with the agents, whom she believed to be true addicts, not Government agents.

Although Miss Floyd testified that she used narcotics to some extent, she said that she was not addicted to their use, and never went through withdrawal symptoms (J.A. 15). Surely there is nothing in the record to support appellant's claim that "she had a record of narcotics use over a long period of time" (Br. 34).¹⁸ However, not belaboring this point, the record clearly indicates that the cautionary instructions as given fully satisfied the *Fletcher* rule. Appellant indulges in a semantic argument, saying the court should have used the word "suspicion" instead of "care and caution," but the difference is not substantial and is not supported by what this Court said in *Fletcher*. The whole point of that decision was to lay down the rule that in certain circumstances a cautionary instruction should be given, i.e., the jury should be warned. At one place in the opinion the word "suspicion" is used and in another place this Court said "the jury should be instructed to scrutinize it closely." See *Ballard v. United States*, — U.S. App. D.C. —, 237 F.2d 582 (1956); *Gardiner v. United States*, — U.S. App. D.C. —, — F.2d — (No. 13211, decided September 27, 1956); *McQuaid v. United States*, 91 U.S. App. D.C. 229, 198 F.2d 987 (1952), cert. denied, 344 U.S. 929. Therefore, when the court told the jury that Floyd's testimony "should be received with care and scrutinized with caution" *Fletcher* was fully complied with.

Appellant also inveighs the charge because it misstated the law with respect to the presumptions to be drawn from possession of narcotics. Title 21 U.S.C. § 174 provides that a showing of possession of the narcotics shall be prima facie evidence that the accused imported them contrary to law. Counts II, III, VI, IX, XII, and XV were brought pursuant to this section. With respect to Count II and the other Counts involving this section the court charged the jury, after reading the statute, that the violation consists of facilitating the concealment and sale of narcotics imported contrary to law, knowing them to have been so imported. The court further told the jury that posses-

¹⁸ Miss Floyd said she had used heroin *once* before she met appellant, and had smoked marijuana in 1953 or 1954 (J.A. 13).

sion was prima facie evidence of a violation of this section, and "if you find that the defendant had possession of this narcotic drug, in the District of Columbia, then from that fact alone you are at liberty to find the defendant guilty of a violation of the statute, without anything more, unless the defendant either by himself or by some other witnesses explains the possession of the drug to your satisfaction." (J.A. 82). Then the court summarized the evidence adduced with respect to Count II and told the jury that if they believed this testimony they could find that appellant had possession of the narcotics in question and therefore find him guilty.¹⁹

The court had fully explained and defined what a conspiracy was, and had explained the aider and abettor theory. Under either theory there was ample evidence to support the above instructions concerning presumptions, and further to support the jury's finding of guilt.

Counts V, VIII, XI, and XIV were brought under 26 U.S.C. § 4704(a) which makes unlawful the purchase, sale or dispensing of narcotics not in the original stamped package, and provides that the absence of the appropriate stamps from the narcotics shall be prima facie evidence of a violation by the person in whose possession they are found. Appellant argues that the presumption clause was erroneously invoked on these counts because the narcotics were never "found" in appellant's possession (Br. 41). This line of reasoning completely ignores the idea of constructive possession by one conspirator if the other conspirator has actual possession, and also ignores the aider and abettor theory.²⁰ Furthermore, it gives the word

¹⁹ Compare *King v. United States*, (No. 13603, decided February 21, 1957 by this Court).

²⁰ In *United States v. Chiarelli*, 192 F.2d 528, 531 (7th Cir. 1951), cert. denied, 342 U.S. 913, in sustaining a conviction for conspiracy, and for violation of 21 U.S.C. § 174 and 26 U.S.C. § 2553(a) against both defendants although the heroin was found on but one of the conspirators the, court said:

"It is apparent from this record that appellants were acting in concert in an illegal undertaking, and thus the narcotics in question were in possession of both."

Also see *Aeby v. United States*, 206 F.2d 296 (5th Cir. 1953), cert. denied, 346 U.S. 885.

"found" a strained literal meaning that the courts have rejected. In *Casey v. United States*, 276 U.S. 394 (1928) a lawyer was convicted under the Harrison Narcotic Act for purchasing morphine not in the original stamped package. The evidence showed that he soaked a towel in a solution of morphine and then sent it to purchasers in the county jail. He was never found with the drugs in his physical possession, but an informer testified that she obtained a towel from the defendant which later was shown to contain morphine. Defendant's conviction of purchasing not from the original stamped package was upheld, based on the presumption that possession of unstamped narcotics was prima facie evidence of a violation by the person in whose possession the drugs were found.

United States v. Pisano, 193 F.2d 355, 360 (7th Cir. 1951) is similar to the instant case. The evidence adduced did not show actual possession of the narcotics by the defendant but his fingerprints were found on an envelope containing some of the drugs. The court said:

"As we understand defendants' contention, they insist that the government must offer direct proof of possession of the drug in order to raise the statutory presumption. We know of no reason why the evidence must be direct."

In the companion case decided the same day, *United States v. Pisano*, 193 F.2d 361, 365 (7th Cir. 1951) the same court said:

"This [the fingerprints] means that he had had his hands upon the package and the paper at some time, in other words, that he handled them, and, in order to do so, he must have had possession of them. Thus the undisputed and unexplained handling of the package by Pisano was sufficient to justify the court's finding of illegal possession."

Also see *United States v. Brown*, 207 F.2d 310 (7th Cir. 1953).

In charging on the counts involving this statute, 26 U.S.C. 4704(a) the court read the statute and told the jury (J.A. 83):

“In other words, if it is proven that the defendant had possession of those drugs and that while in his possession there were no appropriate taxpaid stamps of the drugs, these facts constitute prima facie evidence of a violation of the statute and the jury may find the defendant guilty on that charge, if it sees fit to do so without requiring further proof.”

In light of the fact that Miss Floyd testified that she received the capsules in question from appellant and then turned them over to Agent Fialkewicz, the statutory presumption, as explained in the charge, was properly invoked.²¹

Lastly, appellant points out that the court only discussed reasonable doubt at the outset of the instructions and argues that this too was error, citing *Billeci v. United States*, 87 U.S. App. D.C. 274, 184 F.2d 394 (1950). In that case, after deliberating for ten hours, the jury returned and were given supplemental instructions wherein the court in effect told them that if they believed from all the evidence that the defendant had committed the crime then they should return a verdict of guilty. This Court held that the supplemental instruction was erroneous since it did not tell the jury that they must find the defendant guilty beyond a reasonable doubt. Such a situation is patently distinguishable from the present case, wherein, in a charge covering ten pages (J.A. 76-86), the court spent one page explaining reasonable doubt to the jury. The court emphasized the fact that the jury must find guilt beyond a reasonable doubt by twice stating “Let me repeat” (J.A. 77, 78) and then giving another explanation of what the phrase meant. Surely, the court was not required to continually

²¹ In light of the unequivocal and undisputed testimony that Floyd obtained all the drugs she sold to Fialkewicz from appellant, there was ample evidence to support the jury's verdict without relying upon the statutory presumption at all.

repeat the phrase, and a reading of the charge will clearly demonstrate the careful and thorough manner in which the phrase was explained.

CONCLUSION

Wherefore, it is respectfully submitted that the judgment of the District Court be affirmed.

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STATUTES INVOLVED

Title 26 U.S.C. Section 4704 (a) provides:

It shall be unlawful for any person to purchase, sell, dispense, or distribute narcotic drugs except in the original stamped package or from the original stamped package; and in the absence of appropriate taxpaid stamps from narcotic drugs shall be prima facie evidence of a violation of this subsection by the person in whose possession the same may be found.

Title 26 U.S.C. Section 4705 (a) provides:

It shall be unlawful for any person to sell, barter, exchange, or give away narcotic drugs except in pursuance of a written order of the person to whom such article is sold, bartered, exchanged, or given, on a form to be issued in blank for that purpose by the Secretary or his delegate.

Title 21 U.S.C. Section 174, provides:

Whoever fraudulently or knowingly imports or brings any narcotic drug into the United States or any territory under its control or jurisdiction, contrary to law, or receives, conceals, buys, sells or in any manner facilitates the transportation, concealment, or sale of any such narcotic drug after being imported or brought in, knowing the same to have been imported contrary to law, or conspires to commit any of such acts in violation of the laws of the United States, shall be fined not more than \$2,000 and imprisoned not less than two or more than five years. For a second offense, the offender shall be fined not more than \$2,000 and imprisoned not less than five or more than ten years. For a third or subsequent offense, the offender shall be fined not more than \$2,000 and imprisoned not less than ten or more than twenty years. Upon conviction for a second or subsequent offense, the imposition or execution of sentence shall not be suspended and probation shall not be granted. For the

purpose of this subdivision, an offender shall be considered a second or subsequent offender, as the case may be, if he previously has been convicted of any offense the penalty for which is provided in this subdivision or in section 2557 (b) (1) of Title 26, or if he previously has been convicted of any offense the penalty for which was provided in section 9, chapter 1, of the Act of December 17, 1914 (38 Stat. 789), as amended; sections 171, 173, and 174-177 of this title; section 12, chapter 553, of the Act of August 2, 1937 (50 Stat. 556) as amended; or sections 2557 (b) (1) or 2596 of title 26. After conviction, but prior to pronouncement of sentence, the court shall be advised by the United States Attorney whether the conviction is the offender's first or a subsequent offense. If it is not a first offense, the United States Attorney shall file an information setting forth the prior convictions. The offender shall have the opportunity in open court to affirm or deny that he is identical with the person previously convicted. If he denies the identity, sentence shall be postponed for such time as to permit a trial before a jury on the sole issue of the offender's identity with the person previously convicted. If the offender is found by the jury to be the person previously convicted, or if he acknowledges that he is such person, he shall be sentenced as prescribed in this section.

Whenever on trial for a violation of this section the defendant is shown to have or to have had possession of the narcotic drug, such possession shall be deemed sufficient evidence to authorize conviction unless the defendant explains the possession to the satisfaction of the jury.